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**TRANSCRIPT OF RECORD**

**Supreme Court of the United States**

**OCTOBER TERM, 1951**

**No. 374**

**JOHN F. DICE, PETITIONER,**

**vs.**

**THE AKRON, CANTON & YOUNGSTOWN RAILROAD  
COMPANY**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF OHIO**

**PETITION FOR CERTIORARI FILED JUNE 4, 1951.**

**CERTIORARI GRANTED OCTOBER 3, 1951.**

No. 16 MISC 4

No. 32,414.

Office Supreme Court, U. S.

F I L E D

JUN 4 1951

CHARLES ZENONE CROMLEY  
CLERK

# In the Supreme Court of Ohio

APPEAL FROM  
THE COURT OF APPEALS OF SUMMIT COUNTY.

JOHN F. DICE,  
*Plaintiff-Appellee,*

VS.

THE AKRON, CANTON & YOUNGSTOWN  
RAILROAD COMPANY,  
*Defendant-Appellant.*

## RECORD.

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FREDERIC O. HATCH,

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*Attorneys for Plaintiff-Appellee.*



No. 32,414.

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# In the Supreme Court of Ohio

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APPEAL FROM  
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JOHN F. DICE,  
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VS.

THE AKRON, CANTON & YOUNGSTOWN  
RAILROAD COMPANY,  
*Defendant-Appellant.*

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## RECORD.

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No. 161,856.

## In the Court of Common Pleas

STATE OF OHIO, SUMMIT COUNTY, SS.

JOHN F. DICE,

2854 Morrison Avenue,  
Akron, Ohio,

*Plaintiff,*

VS.

THE AKRON, CANTON & YOUNGSTOWN  
RAILROAD COMPANY,

a corporation,

12 East Exchange Street,  
Akron, Ohio,

*Defendant.*

### **PETITION.**

(Filed in Common Pleas Court May 21, 1947.)

1. Plaintiff says that the Akron, Canton & Youngstown Railroad Company is and was at all times herein mentioned, a corporation duly organized and existing under the laws of the State of Ohio, empowered to operate and operating as a common carrier a steam railroad system in and about the State of Ohio, and particularly in the County of Allen, including the point of the accident hereinafter described.

2. Plaintiff further says that at all times herein referred to the plaintiff and the defendant were engaged in

brought under and by virtue of the Federal Employers' Liability Act of April 22, 1908, and amendments thereto.

3. Plaintiff says that on the 29th day of May, 1944 and prior thereto, he was in the employ of the defendant company as a fireman, and that at approximately 10:08 A. M. on said date, he was at work and in the performance of his duties as a fireman and was on board engine No. 404 hauling ten (10) freight cars in a westerly direction from Akron, Ohio to Delphos, Ohio along the defendant's track, that when they reached a point at Rushmore, Ohio, at a switch going into a siding, known as the "beet" switch, suddenly and without warning to the plaintiff, said engine No. 404 was negligently caused to jump the track, pulling the engine to the left and half-way around, headed east, and turning said engine on its right side.

4. Plaintiff says that as a direct result of said occurrence, he received injuries hereinafter complained of and that said injuries were directly and proximately caused by the negligence of the defendant, the details of which are particularly within the knowledge of the defendant.

5. Plaintiff says that as a direct and proximate result of the negligence of the defendant, he was thrown violently about the interior of said engine No. 404, and thereby sustained and suffered bruises and contusions all over his entire body, particularly in the region of his lower left abdomen (or groin); internal injuries and severe traumatic shock; and that his general condition of health has been permanently changed, undermined and impaired. That he was hospitalized in the City Hospital of Akron for a period of one (1) week; and was

thereafter removed to his home for a period of eight (8) days. That since returning to work he has been compelled to remain off of his job, by reason of said injuries, intermittently for a period totaling One Hundred and Twenty-eight (128) days. That since April 24, 1947 he has been unable to perform any of his duties for the defendant, and has been informed, and therefore alleges the fact to be, that he will be unable to perform his duties as a fireman or as an engineer, by reason of the fact that he is now entitled to promotion as an engineer, for a long period of time in the future and perhaps for the rest of his life.

6. Plaintiff further says that at the time of said occurrence, he enjoyed good health and earned and was capable of earning a sum of Four Hundred Dollars (\$400.00) a month.

7. Plaintiff says that by reason of the aforesaid injuries, he has incurred expenses for medical treatment and X-rays in the sum of Two Hundred Dollars (\$200.00) and was and has been informed and therefore alleges the fact to be, that he will have further expense by reason of said injuries.

8. Wherefore, plaintiff prays judgment against the defendant in the sum of Fifty Thousand, Two Hundred Dollars (\$50,200.00) together with the costs of this action, and that the defendant answer the interrogatories to the petition annexed.

GOTTWALD, HERSHEY & HATCH,  
(FREDERIC O. HATCH)

*Attorneys for Plaintiff,*

(Duly verified.)

(Interrogatories omitted.)

4

**ANSWER.**

(Filed in Common Pleas Court June 20, 1947.)

**FIRST DEFENSE.**

Now comes the defendant, The Akron, Canton & Youngstown Railroad Company, and for answer and first defense to the petition filed herein, admits its corporate organization and capacity as alleged in the petition; admits that at the time of the occurrence set forth in the petition plaintiff and defendant both were engaged in interstate commerce; that plaintiff at said time was in the employ of the defendant as a fireman and was so engaged on board engine No. 404 on the 30th day of May, 1944.

Defendant further admits that on or about the 30th day of May, 1944 a locomotive attached to a train of freight cars was traveling in a westerly direction from Akron to Delphos, Ohio, on defendant's tracks, and that at a point near Rushmore, Ohio, said locomotive No. 404 left the track; that as a result thereof plaintiff sustained some injuries, but denies that plaintiff on said occasion received injuries to the extent in the petition alleged, and on the contrary avers that said injuries were not of a serious nature.

Further answering, defendant denies each, every and all the statements and averments contained in the petition, not herein specifically admitted by it to be true. Defendant says it was guilty of no negligence in the premises and is indebted to plaintiff in no sum whatever.

## SECOND DEFENSE.

For a second and further defense, defendant adopting and making a part hereof as fully as if rewritten herein, all the statements and averments of its first defense above contained, says that without admitting negligence on its part and for the purpose of avoiding litigation, this defendant made a full and complete settlement with the plaintiff for any and all injuries which plaintiff received by reason of the accident set forth in the petition herein; and that as consideration for said release this defendant paid to the plaintiff the sum of Nine Hundred Twenty-four Dollars and Sixty-three Cents (\$924.63). As evidence of said full and complete settlement and release of the defendant on the part of the plaintiff for any and all injuries which plaintiff received on the aforesaid occasion, plaintiff and defendant entered into a written agreement and release under date of September 9th, 1944, a true and correct copy of which is as follows, to-wit:

“THE AKRON, CANTON & YOUNGSTOWN RAILROAD  
COMPANY

AGREEMENT AND RELEASE File: 7-2805

THIS AGREEMENT MADE this 5th day of September, 1944 by and between THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY and John F. Dice of Akron, State of Ohio hereinafter known as the Claimant:

WITNESSETH:

THAT The Akron, Canton & Youngstown Railroad Company hereby agrees to pay said Claimant the sum of \$475.78 as the sole consideration and without any other promise or agreement, and said

Claimant hereby agrees that he will accept said sum from The Akron, Canton & Youngstown Railroad Company in full settlement and satisfaction of, and that he will and does by these premises, release and discharge said The Akron, Canton & Youngstown Railroad Company from all claims, demands and causes of action whatsoever in whatever manner arising against The Akron, Canton & Youngstown Railroad Company, its successors and assigns, at common law or under any state or federal statute, which the said Claimant now has, including such as have arisen by reason of or in any manner may grow out of personal injury received at Rushmore, Ohio, 10:08 A.M., May 29th, 1944, in addition to settlement made on June 14th, 1944, and partial settlements of \$75.00 each, made on August 8th, 14th, and 28th, 1944.

IN WITNESS WHEREOF, the said John F. Dice and said The Akron, Canton & Youngstown Railroad Company have executed this agreement and release on this 9th day of September, 1944.

THE AKRON, CANTON & YOUNGSTOWN  
RAILROAD COMPANY

By H. J. WATKINS

JOHN F. DICE, Claimant

Executed in the  
presence of:

AUDREY GOULDTHREAD

A. W. HOCHBERG

AUDREY GOULDTHREAD

A. W. HOCHBERG

7  
I certify that I fully understand the contents of the above instrument and that the affixing of my signature thereto is my free and voluntary act.

JOHN F. DICE, Claimant

Executed in the presence of

AUDREY GOULDTHREAD

A. W. HOCHBERG

\$475.78

Akron, Ohio, September 9th, 1944.

I have this day received from The Akron, Canton & Youngstown Railroad Company the sum of \$475.78 in full satisfaction of the obligations of The Akron, Canton & Youngstown Railroad Company to me under the provisions of the above contract.

JOHN F. DICE, Claimant."

Defendant says that the above agreement and release constitutes a full and complete settlement and release of any and all claims the plaintiff sets forth in his petition herein.

WHEREFORE, having answered, defendant asks that the petition in this action may be dismissed and that it may go hence with its costs herein expended.

WISE, ROETZEL, MAXON, KELLY & ANDRESS,

By C. G. WISE,

*Attorneys for Defendant.*

(Duly verified.)

**REPLY.**

(Filed in Common Pleas Court August 4, 1947.)

For reply to the defendant's first defense, plaintiff denies each and every statement, allegation and averment therein contained not hereinbefore specifically admitted to be true.

For reply to defendant's second defense, plaintiff specifically denies that the defendant made a full and complete settlement with the plaintiff for any and all injuries which the plaintiff received by reason of the occurrence which happened on or about the 30th day of May, 1944 while acting as a fireman on a locomotive near Rushmore, Ohio. Plaintiff admits that in September, 1944 he received some money from the defendant, the exact amount thereof being particularly within the knowledge of the defendant, but denies that the receipt thereof constituted a full and complete settlement of all of his claims against the defendant company. Plaintiff says that in September, 1944 when he reported back to work, one A. W. Hockberg, Chief Clerk for the defendant company, informed him that it would be necessary to sign a paper releasing the defendant company from all claims for loss of time and medical expenses up to that date before he could go back to work, and that in the event of plaintiff's inability to work in the future or if he incurred further medical expenses in the future as a result of plaintiff's injury in May of 1944, the disability file of the plaintiff would be reopened as per the defendant company's previous custom in the past in his case, and that he relied on said promises and representations.

Plaintiff further says that thereafter he became disabled, unable to work and incurred medical expenses as a result of the injuries he received on or about May 30th,

1944, as more fully set forth in his petition filed herein, and prior to the filing thereof, requested the defendant company to reopen his case pursuant to defendant's promises and representations hereinabove set forth; that at that time the defendant, through its agents, A. W. Hockberg and H. J. Watkins, Vice President, agreed so to do; that on the 29th day of April, 1947, the defendant, through the said H. J. Watkins, instructed plaintiff to present himself to defendant company's Chief Surgeon, Jay D. Smith, M. D., for another examination; that plaintiff complied with said instructions; that thereafter defendant company refused to honor plaintiff's claim for compensation and reimbursement of medical expense.

Plaintiff now says that all of said promises and representations of the defendant company, by and through the said Chief Clerk and Vice President, were false and fraudulent and made for the express purpose and with the intent of defrauding plaintiff, and that by reason thereof said release is null and void.

Plaintiff further says that he at no time received any consideration from the defendant company for the execution of said purported release and that said release was wholly void and without consideration, and says that subsequently thereto, after he had been informed that defendant company relied upon said purported release as a defense to his present claim, he tendered back to the defendant the sum of Nine Hundred, Twenty-four Dollars and Sixty-three Cents (\$924.63) in United States currency, which tender was refused.

Wherefore, plaintiff prays as in his petition, and that said purported release be held void and of no legal effect.

GOTTWALD, HERSHEY & HATCH,

*Attorneys for Plaintiff.*

(Duly verified.)

**AMENDED REPLY.**

(Filed in Common Pleas Court May 25, 1949.)

For reply to the defendant's first defense, plaintiff denies each and every statement, allegation and averment therein contained not hereinbefore specifically admitted to be true. —

For reply to defendant's second defense, plaintiff specifically denies that the defendant made a full and complete settlement with the plaintiff for any and all injuries which the plaintiff received by reason of the occurrence which happened on or about the 30th day of May, 1944 while acting as a fireman on a locomotive near Rushmore, Ohio. Plaintiff admits that in September, 1944 he received some money from the defendant, the exact amount thereof being particularly within the knowledge of the defendant, but denies that the receipt thereof constituted a full and complete settlement of all of his claims against the defendant company. Plaintiff says that in September, 1944 when he reported back to work, one A. W. Hockberg, Chief Clerk for the defendant company, informed him that it would be necessary to sign a paper releasing the defendant company from all claims for loss of time and medical expenses up to that date before he could go back to work and that he relied on said promises and representations.

Plaintiff denies that he knew at the time of the execution of the purported release set forth in defendant's answer was a complete release in satisfaction of all claims, demands and causes of action that the plaintiff had against the defendant corporation.

By way of further reply, this plaintiff says that at the time of the execution of said purported release, he

had no knowledge that said release was a full and complete release of all of his claims against the defendant corporation, but says that one, A. W. Hockberg, Chief Clerk of the defendant corporation, represented to this plaintiff that said purported release was a release only for the wages lost by this plaintiff to the date thereof, by reason of his being unable to work by reason of the injuries he had sustained on or about May 29th, 1944, and that said representation was false, fraudulent and was relied on by the plaintiff.

Plaintiff now says that all of said promises and representations of the defendant company, by and through the said Chief Clerk, were false and fraudulent and made for the express purpose and with the intent of defrauding plaintiff, and that by reason thereof said release is null and void.

Plaintiff further says that he at no time received any consideration from the defendant company for the execution of said purported release and that said release was wholly void and without consideration, and says that subsequently thereto, after he had been informed that defendant company relied upon said purported release as a defense to his present claim, he tendered back to the defendant the sum of Nine Hundred, Twenty-four Dollars and Sixty-three (\$924.63) in United States currency, which tender was refused.

Wherefore, plaintiff prays as in his petition, and that said purported release be held void and of no legal effect.

GOTTWALD, HERSHEY & HATCH;

*Attorneys for Plaintiff.*

(Duly verified.)

**DEMURRER TO AMENDED REPLY.**

(Filed in Common Pleas Court October 13, 1949.)

Now comes the Defendant, The Akron, Canton & Youngstown Railroad Company, and demurs to the amended reply filed herein on the ground and for the reason that on its face it is insufficient in law. Defendant in the alternative demurs to the following averments of said amended reply:

1. "Plaintiff specifically denies that the Defendant made a full and complete settlement with the Plaintiff for any and all injuries which the Plaintiff received by reason of an occurrence which happened on or about the 30th day of May, 1944, while acting as a fireman on a locomotive near Rushmore, Ohio."

2. "Denies that the receipt thereof constituted a full and complete settlement of all of his claims against the Defendant company."

3. "Plaintiff denies that he knew at the time of the execution of the purported release set forth in Defendant's answer was a complete release and satisfaction of all claims, demands and causes of action that the Plaintiff had against the Defendant corporation."

4. "This Defendant says that at the time of the execution of said purported release he had no knowledge that said release was a full and complete release of all of his claims against the Defendant company."

WISE, ROETZEL, MAXON, KELLY & ANDRESS,  
*Attorneys for Defendant.*

**MOTION FOR JUDGMENT ON SPECIAL FINDINGS  
OF FACT.**

(Filed in Common Pleas Court October 20, 1949.)

Now comes The Akron, Canton & Youngstown Railroad Company, defendant herein, and moves the Court for an order entering judgment in favor of The Akron, Canton & Youngstown Railroad Company upon the special findings of fact returned herein by the Jury and notwithstanding the general verdict of the Jury in favor of the plaintiff heretofore rendered.

WISE, ROETZEL, MAXON, KELLY & ANDRESS,  
*Attorneys for Defendant.*

**MOTION FOR JUDGMENT NOTWITHSTANDING  
VERDICT.**

(Filed in Common Pleas Court October 20, 1949.)

Now comes The Akron, Canton & Youngstown Railroad Company, defendant herein, and moves the Court for an order entering judgment in favor of The Akron, Canton & Youngstown Railroad Company and against the plaintiff, John F. Dice, notwithstanding the general verdict in favor of the plaintiff heretofore rendered.

WISE, ROETZEL, MAXON, KELLY & ANDRESS,  
*Attorneys for Defendant.*

**NOTICE OF APPEAL.**

(Filed in Common Pleas Court February 23, 1950.)

The plaintiff-appellant, John F. Dice, hereby gives notice of appeal to the Court of Appeals for the Ninth District of Ohio from a judgment rendered by the Common Pleas Court of Summit County, Ohio, in the above entitled cause on the 23rd day of February, 1950, wherein said court granted defendant's motion for judgment in its favor and against this plaintiff notwithstanding the general verdict of the jury in favor of this plaintiff, and rendered judgment accordingly.

Said appeal is on questions of law.

GOTTWALD, HERSHEY & HATCH,  
Attorneys for Plaintiff-Appellant, John F. Dice  
(Frederic O. Hatch).

(Receipt acknowledged February 23, 1950.)

**TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES.**

To Court of Appeals.

No. 161,856.

**COMMON PLEAS COURT, SUMMIT COUNTY, OHIO.**

- May 21, 1947. Petition & Affidavit filed.
- May 21, 1947. Interrogatories filed.
- May 21, 1947. Precipe filed.
- May 21, 1947. Summons issued to Sheriff of Summit County.
- May 29, 1947. Summons Ret'd Endr.: And on May 28th, 1947, I served the within named The Akron, Canton & Youngstown Railroad Co., a corporation, by

serving H. B. Stewart, Jr. President of said Corporation, by personally handing to him a true and certified copy thereof with all the endorsements thereon. ROBERT L. SMITH, Sheriff. By W. P. O'NEIL, Deputy.

June 20, 1947. Answer and Affidavit filed.

August 4, 1947. Journal Entry filed. April Term. Upon application, the plaintiff is hereby granted leave to file his reply instanter. APPROVED BERNARD J. ROETZEL, Judge. JL: 328-4.

August 4, 1947. Reply and Affidavit filed.

September 2, 1947. April 1947 Term continued to September 1947 Term.

January 2, 1948. September 1947 Term continued to January 1948 Term.

April 1, 1948. January 1948 Term continued to April 1948 Term.

September 1, 1948. April 1948 Term continued to September 1948 Term.

January 3, 1949. September 1948 Term continued to January 1949 Term.

April 4, 1949. January 1949 Term continued to April 1949 Term.

May 23, 1949. Journal Entry filed. April Term. Now on this the 23 day of May, A. D. 1949, it being a day in the April Term of said court, came the parties herein, by their attorneys; also came the following named persons as jurors, to-wit:

- |                      |                    |
|----------------------|--------------------|
| 1. Marjorie Hathaway | 8. Ellis Gregg.    |
| 2. John Chambliss    | 9. Bruce Hammond   |
| 3. Anna Thomas       | 10. Mary Yaste     |
| 4. William Briggs    | 11. Andrew Herrick |
| 5. Frances Kirby     | 12. Wm. Shellman   |
| 6. Alfred Roos       | 13. Martin Berljic |
| 7. Bessie Cormany    |                    |

who were duly impaneled and sworn according to law; and thereupon the case came on for hearing on the pleadings and evidence. And the said jury having heard the testimony adduced in part, and the hour of adjournment having arrived, the court discharged said jury until Tuesday morning, May 24, 1949, at 9 o'clock, until which time the further hearing of this cause is continued. HON. COLOPY, *Presiding Judge*. JL. 338-541.

May 24, 1949. Journal Entry filed. April Term. Now on this, the 24 day of May, A. D. 1949 it being a day in the April Term of our said court, again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn, and the trial proceeded. And the said jury having heard the testimony adduced in part, and the hour of adjournment having arrived, the court discharged said jury until Wednesday morning May 25, 1949, at 9 o'clock, until which time the further hearing of this cause is continued. HON. COLOPY, *Presiding Judge*. JL. 338-546.

May 25, 1949. Journal Entry filed. April Term. Upon application of the plaintiff, leave is hereby granted plaintiff to file his amended reply, instant. STEPHEN C. COLOPY, *Judge*. JL. 338-574.

May 25, 1949. Amended Reply and Affidavit filed.

May 25, 1949. Journal Entry filed. April Term. Now on this, the 25 day of May, A. D. 1949 it being a day in the April Term of our said Court, again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn, and the trial proceeded. And the said jury having heard the testimony adduced, and arguments of counsel and the hour of adjournment having arrived, the court discharged said jury until

Thursday morning May 26, 1949, at 9 o'clock, until which time the further hearing of this cause is continued.

HON. COLOPY, *Presiding Judge*. JL. 338-572.

May 26, 1949. Journal Entry filed: April Term. Now on this, the 26 day of May, A. D. 1949 it being a day in the April Term of our said court again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn, and the trial proceeded. And the said jury having heard the testimony adduced, arguments of counsel, charge by the court retired to jury room for deliberation and the hour of adjournment having arrived, the court discharged said jury until Friday morning May 27, 1949, at 9 o'clock, until which time the further deliberation of this cause is continued: HON. COLOPY, *Presiding Judge*. JL. 338-577.

May 27, 1949. Journal Entry filed. April Term. Now on this, the 27 day of May, A. D. 1949 it being a day in the April Term of our said court, again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn. And the said jury having been unable to reach a verdict, were dismissed by the court. HON. COLOPY, *Presiding Judge*. JL. 338-593.

May 28, 1949. Motion filed. (Defendant.)

July 19, 1949. Finding (Colopy, J.) filed. (Original Missing.)

July 26, 1949: Journal Entry filed. April Term. This cause came on to be heard upon the motion of the defendant, filed May 28th, 1949, requesting the Court to vacate each of its former rulings, to-wit: in overruling the motion of the defendant for judgment upon the pleadings and the opening statement of counsel for plaintiff; in overruling the motion of defendant for a directed

verdict made at the conclusion of plaintiff's evidence; in overruling the motion of defendant for a directed verdict made at the conclusion of all of the evidence, and, upon such vacation, for an order sustaining each or all of said motions and for the entering of a judgment on behalf of defendant on the ground and for the reason that plaintiff, as a matter of law, is not entitled to any verdict, finding or judgment on his behalf, and that defendant is entitled to final judgment herein, and upon consideration thereof, the Court finds that said motion should be, and it is hereby, overruled. To all of which defendant objects and excepts. COLOPY, *Judge*, by BERNARD J. ROETZEL, *Judge*. JL. 339-604.

September 6, 1949. April 1949 Term continued to September 1949 Term.

October 13, 1949. Demurrer to Reply filed.

October 19, 1949. Verdict for Plaintiff filed. We, the Jury, being duly impaneled and sworn find the issues in this case in favor of the Plaintiff, and assess the amount due to the Plaintiff from the Defendant the said The Akron, Canton and Youngstown Railroad Co., at the sum of (\$25,000.00) Twenty-five Thousand and 00/100 Dollars. And we do so render our verdict upon the concurrence of 10 members of our said Jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 19th day of October, 1949.

1. Paul H. Mueller

2. Levi V. Jones

3. George C. Paul

4. Betty J. Kohler

5. Edna Hoffman

6. Frances M. Forello

7. Abbie A. Barber

8. Helen E. Scudder

9. Smelia Davis

10. August H. Backus

11.

12.

## QUESTION 1.

Question: If you find in favor of the plaintiff on the issue with respect to the validity of the "agreement and release" of September 5, 1944 (Exhibit 6), then state and describe the act or acts of defendant, upon which you base such finding.

Answer: We, of the jury, consider Exhibit 8 null and void since the defendant did not adhere to the validity of the "agreement and release," known as Exhibit 8, therefore, reopening the situation by continuing to make payments to the plaintiff. We find Exhibit 6 invalid because of conflicting dates Sept. 5th and Sept. 9th, 1944.

(Signed) Abbie A. Barber, Frances M. Forello, Edna Hoffman, Margaret A. Stockton, Betty J. Kohler, Levi V. Jones, Paul H. Mueller, August H. Backus, George C. Paul, Helen E. Scudder, Smelia Davis, .....

## QUESTION 2.

Question: Did plaintiff have an opportunity to read the "agreement and release" of September 5, 1944 (Exhibit 6), prior to or at the time he received a check for \$475.78.

Answer: Yes.

(Signed) August H. Backus, Smelia Davis, Helen E. Scudder, Abbie A. Barber, Frances M. Forello, George C. Paul, Margaret A. Stockton, Betty J. Kohler, Edna Hoffman, Levi V. Jones, Paul H. Mueller, .....

## QUESTION 3.

Question: Did plaintiff have an opportunity to read the bank check of September 5, 1944, for \$475.78 (Ex-

hibit 12-11) between the time he received said check and the time he received payment therefor.

Answer: Yes.

(Signed) August H. Backus, Smelia Davis, Helen E. Scudder, Abbie A. Barber, Frances M. Forello, George C. Paul, Margaret A. Stockton, Edna Hoffman, Betty J. Kohler, Levi V. Jones, Paul H. Mueller, .....

#### QUESTION 4.

Question: Was plaintiff prevented from reading the "agreement and release" of September 5, 1944 (Exhibit 6).

Answer: No.

(Signed) August H. Backus, Smelia Davis, Helen E. Scudder, Abbie A. Barber, Frances M. Forello, George C. Paul, Margaret A. Stockton, Betty J. Kohler, Edna Hoffman, Levi V. Jones, Paul H. Mueller, .....

#### QUESTION 5.

Question: If your answer to question No. 4 is yes, then state in what manner he was so prevented.

Answer: .....

(No Signatures.)

#### QUESTION 6.

Question: If you find by a preponderance of the evidence that plaintiff was injured on May 29, 1944, and that such injury resulted in whole or in part from the negligence of any of the officers, agents, or employees of defendant, then state of what such negligence consisted.

Answer: The evidence of neglect is found in the fact that the plaintiff did not have immediate and the proper hospital care.

(Signed) Edna Hoffman, Margaret A. Stockton, Betty J. Kohler, Helen E. Scudder, Frances M. Forello, Abbie A. Barber, Smelia Davis, Paul H. Mueller, George C. Paul, August H. Backus, Levi V. Jones, .....

#### QUESTION 7.

Question: If you find by a preponderance of the evidence that plaintiff was injured on May 29, 1944, and that such injury was by reason of any defect or insufficiency due to the negligence of defendant in its cars, engines, appliances, machinery, track, roadbed, works, or other equipment, then name and describe such defect or insufficiency.

Answer: .....

(No Signatures) JL 341-144.

October 20, 1949. Motion for Judgment Notwithstanding verdict filed.

October 20, 1949. Motion for Judgment on Special Findings of Fact filed.

(Not stamped) Memorandum in Support of Motions of Defendant for Final Judgment.

(Not stamped) Brief on Behalf of Plaintiff.

December 12, 1949. Finding (Harvey, J.).

January 3, 1950. September 1949 Term of Court continued to January 1950 Term.

February 23, 1950. Journal Entry filed. January Term. This cause came on to be heard upon the demurrer to reply filed by the defendant herein, and upon considera-

tion thereof, the court finds that said demurrer should be overruled. It is, therefore, ordered, adjudged and decreed that the demurrer be and the same is hereby overruled. To all of which defendant objects and excepts. FRANK H. HARVEY, *Judge*. JL. 343-168.

February 23, 1950. Journal Entry filed. January Term. This cause, coming on for hearing on the motions of the defendant, The Akron, Canton & Youngstown Railroad Company, to-wit:

1. A motion for judgment in favor of said defendant upon the special findings of fact returned by the jury and notwithstanding the general verdict of the jury in favor of the plaintiffs, and
2. A motion for judgment in favor of said defendant and against said plaintiff, notwithstanding the general verdict of the jury in favor of the plaintiff, was submitted to the Court on the arguments and briefs of counsel. On consideration thereof, the court overrules the motion of the defendant for judgment upon the special findings of fact, notwithstanding the general verdict of the jury, and sustains the motion of said defendant for judgment notwithstanding the general verdict in favor of the plaintiff. And the Court, coming now to enter judgment upon such findings, it is the order, judgment and decree of the Court that the general verdict of the jury heretofore rendered be vacated, set aside and held for naught, and it is further ordered by the Court that judgment be, and the same hereby is, entered in favor of the defendant, The Akron, Canton & Youngstown Railroad Company, and against the plaintiff, John F. Dice, and that said defendant, The Akron, Canton & Youngstown Railroad Company, go

hence without day and recover from the plaintiff, John F. Dice, its costs herein expended, taxed at \$.....  
 To which order and judgment of the Court, in sustaining the motion of the defendant for judgment in its favor, notwithstanding the general verdict of the jury, the plaintiff here and now excepts, and to which order of the court, in overruling the motion of the defendant for judgment upon the special findings of fact and notwithstanding the general verdict of the jury, the defendant here and now excepts. FRANK H. HARVEY, Judge. JL. 343-168.

February 23, 1950. Notice of Appeal and Receipt filed.

February 23, 1950. Precipe filed.

(Duly certified.)

### **Supplemental Transcript of Docket and Journal Entries.**

February 23, 1950. Bill of Exceptions filed in Common Pleas Court. Verne T. Bender, Clerk. Lillian Martin, Deputy.

February 23, 1950. Notice of filing Bill of Exceptions to Attys. Wm. A. Kelly and Geo. Rooney. Verne T. Bender, Clerk. Lillian Martin, Deputy.

March 6, 1950. Bill Transmitted to Judge Harvey. Verne T. Bender, Clerk. Lillian Martin, Deputy.

March 16, 1950. Bill of Exceptions Transmitted back to Clerk of Courts and filed in Court of Appeals. Verne T. Bender, Clerk. Lillian Martin, Deputy.

(Duly certified.)

**BILL OF EXCEPTIONS.**

(Filed February 10, 1950.)

**(2) APPEARANCES:**

FREDERIC O. HATCH, Esq.,

*On behalf of Plaintiff.*WILLIAM A. KELLY, Esq., and GEORGE W. ROONEY,  
Esq.,*On behalf of Defendant.*

BE IT REMEMBERED that upon the trial of the above entitled cause on the 13th day of October, A. D. 1949, being a day in the September A. D. 1949 Term of the Court of Common Pleas of Summit County, Ohio, before the Honorable Frank H. Harvey, Judge Presiding and before a jury was impaneled the following proceedings were had:

Mr. Kelly: This cause having been duly assigned this 13th day of October, 1949 to the Honorable Frank H. Harvey for trial, the defendant at this time asks leave of the Court to file instanter a demurrer to the Amended Reply now appearing in the files of this action.

This cause came on for trial in May of this year before the Honorable Stephen Colopy, and during the progress of the (3) trial and over the objection of the defendant plaintiff was permitted to file an Amended Reply.

The request of the defendant now is to file a demurrer to this Amended Reply, and in conjunction therewith defendant submits to the Court said demurrer, copy of which has this day been handed to counsel for plaintiff.

Mr. Hatch: Let the record show that the plaintiff objects at this time to application of the defendant for

the reason that the demurrer is not timely. The Amended Reply had been filed in May of 1949, and that at that time the defendant elected to proceed with the trial and its defense, and that since that time—since the consummation of that particular trial many months has elapsed. The defendant at the date of trial on October 13th for the first time files this demurrer.

(Discussion between Court and counsel not reported.)

Mr. Hatch: If the Court please, we object to this application because it is out of rule and untimely.

The Court: Well, I am inclined to believe that if the plaintiff could sustain the allegations of this Reply by clear and convincing evidence that it would amount in substance to proof that there was no release in legal existence because it wouldn't represent a clear-cut meeting of the minds. If that arose by reason of a misrepresentation, that is a representation that the release would do thus and so when it was intended for something else, the release does say what it will do, but if it is intended to do one thing, represented to do one thing and it really did something else, it would be a fraud.

Mr. Hatch: There was a misrepresentation of a past (4) and present fact, namely, that it contained only a release for wages whereas it was a full and complete release of all claims and demands and there was a reliance on that.

(Further discussion not reported.)

The Court: You don't want to present this matter to the Court without a jury?

Mr. Kelly: Yes, I do.

The Court: If you don't want to, just say so. It doesn't insult me. I don't take it personally.

Mr. Hatch: I know you don't. I know you don't. I am not so sure I wouldn't mind doing that. I think that is one of the things that confused the jury before.

(Further discussion.)

Mr. Hatch: I would like to confer with my client.

The Court: All right.

Mr. Hatch: I think we would rather submit the whole thing to the jury.

Mr. Kelly: What is the ruling on the request of the defendant for leave to file this demurrer to the Amended Reply?

The Court: Oh, you may have leave to file demurrer.

Mr. Hatch: Except.

The Court: I will overrule it.

Mr. Kelly: At this time let the record show the demurrer to the Amended Reply is filed, considered by the Court.

The Court: Yes.

Mr. Kelly: The record will show it is filed of record.

Mr. Rooney, take it over and have it stamped by the Clerk, please.

Now, at this time the defendant respectfully requests (5) a ruling on the demurrer to the Amended Reply.

The Court: I thought I said it was overruled.

Mr. Kelly: To all of which the defendant excepts.

Now, comes the defendant and objects to proceeding to trial by jury until the validity of the release as pleaded by defendant in the second defense of its Answer is first determined, and further specifically requests that all issues of law apparent from the face of the pleadings

wherein be tried by the Court, and further that the question of the validity of said release be determined by the Court as a matter of law separate and apart from and prior to the determination of any issues of fact.

The Court: Well, there are some allegations in here that are bothersome, but he seems to have—for example: he says that the execution of the purported release set forth in the defendant's Answer he denies was a complete release. Now, of course that is in a sense a double meaning. A release that is voidable might not be complete and a release that is void certainly wouldn't be complete, would it?

Mr. Hatch: I think, if Your Honor please, we admit we received Nine Hundred and some Dollars which we tendered back.

The Court: Yes.

Mr. Hatch: The tender was refused; so, we at least endeavored to create the status quo.

The Court: Well, I will listen to the evidence on that and see what you really have got.

Mr. Kelly: Are you going to—

Mr. Hatch: How do you mean, Your Honor? You mean (6) without the jury?

The Court: No, with the jury present.

Mr. Kelly: Note an exception on behalf of the defendant.

And thereupon a prospective jury panel was brought into the Courtroom, and thereupon Mr. Hatch on behalf of plaintiff and Mr. Kelly on behalf of defendant questioned the jurors on voir dire and made several challenges whereupon the extra prospective jury panel of

four was exhausted. Thereupon Mr. Hatch stated, "Well, if Your Honor please, insofar as the plaintiff is concerned, we are satisfied with the panel as it is now constituted." Whereupon the Court asked, "Is defendant satisfied?" Then Mr. Kelly stated: "I think we should have the panel complete, Your Honor, before we are required to exercise any challenge."

The Court: It is quarter of twelve. I think we had better adjourn. I think we had better. Members of the panel, you are admonished that during your absence from the Courtroom you will not discuss this case or permit anyone to discuss this case with you in any way whatsoever. You are members of a panel that have not been sworn in in this case, however you should conduct yourselves as though you were sworn jurors, talking to nobody, communicating with no one with reference to this lawsuit. You are now excused. We will resume hearing here at one-fifteen.

And thereupon Court adjourned until one-fifteen o'clock P. M., on said day at which time the trial of said cause proceeded as follows:

(7) P. M. Session, October 13, 1949.

Thereupon another prospective juror was put on the jury panel, Ruby Compton, and duly examined.

Mr. Kelly: Where do we stand now? Has Mr. Hatch passed for cause?

The Court: He is satisfied.

Mr. Kelly: No further challenges on behalf of the defendant.

And thereupon the jury was duly sworn by the Court.

Whereupon Mr. Hatch on behalf of plaintiff stated to the Court and jury his claim and the evidence by which he expected to sustain the same as follows:

Mr. Hatch: If the Court please,—Ladies and Gentlemen of the jury—

Now that you have been sworn in as jurors, it is the duty of the plaintiff's counsel to make an opening statement as to what we expect the evidence to prove, what the witnesses that we bring before you will testify to. The plaintiff begins an action by filing a Petition. To that the defendant may file an Answer, and if there is anything new that is set forth in the defendant's Answer the plaintiff then files a Reply. Those are the pleadings in any lawsuit in Ohio.

In Mr. Dice's Petition,—as I told you before he is the plaintiff, and he filed the petition. In his Petition he states that the Akron, Canton, Youngstown Railway is an Ohio corporation which runs a steam locomotive system in the State of Ohio, particularly between Akron and Delphos in the western part of the State and more particularly in Allen County where (8) this derailment took place. Mr. Dice in his Petition says that he was employed as a fireman in May, 1944 when this collision or upset took place; that the defendant the Railway Company is engaged in interstate commerce and that he on that date was likewise engaged in interstate commerce and by reason of that fact the action is brought under what they call the Federal Employers Liability Act of 1908 with amendments thereto. The Judge later on will charge you as to that law.

Mr. Dice says that on the 30th day of May—there may be some evidence that it was on the 29th; but that

is not important. It was on or about the 30th day of May, 1944, he was engaged as a fireman on a locomotive, Number 404, going in a westerly direction towards Delphos from Akron; that when they approached Rushmore, which is just this side of the end of the line, Delphos, the locomotive or the pony trucks of the locomotive went into a siding or a switch and that the main drive wheels went on the main track, which caused the locomotive to turn completely around so that it was headed back east or towards Akron then turn over on its right side. When that happened Mr. Dice was thrown about the interior of the cab and he received some injuries. That he was brought to the Akron City Hospital and was there a few days and then was off work for a while, finally went back to work, and that thereafter he was intermittently off work until April of 1947 when he was unable to continue to work because of this injury that he had received. And that by reason of that fact he is asking you jurors to award him damages for those injuries and for loss of earnings.

(9) That briefly is what he has set forth in his petition.

Now, as I stated before, the defendant has filed an Answer. Now in that Answer they have set forth a purported agreement and a release which they say was signed by Mr. Dice; that when he went back to work back in 1944 he signed this agreement and release releasing all his claims against the AC&Y. Now if there was not any more to it than that we wouldn't be here asking you jurors to give Mr. Dice a verdict. We say in our Reply, now, that was a new matter brought up in the Answer. In our Reply or Amended Reply which we

filed to that Answer we say we admit we got some money, I think the amount will be somewhere around Nine Hundred Dollars. We admit we got that money. We say that if we signed some paper or an agreement and release that it was not for his injuries and future loss of work by reason of this injury. What we signed was a receipt and a release for the wages lost up to the date of signing that.

I think the evidence will bear us out on that, that it is to the penny as to the lost earnings up until the date of the signing of this paper. We say that we were induced to sign that paper by the misrepresentation, the fraudulent misrepresentation of the AC&Y in that they represented to Mr. Dice that he was signing a receipt and release only for wages. We did not know that this paper and agreement contained a full and complete release for everything.

Now, briefly that is the issues in this case, and you will be first probably called upon to listen to the charge of the Court as to the law in the matter and then first decide whether or not the paper that he signed constituted a full and (10) complete release or whether there was some misrepresentations that induced Mr. Dice to sign.

Briefly, ladies and gentlemen of the jury, that is this lawsuit. I know that the defendant will try to complicate this matter by bringing in a lot of extraneous matters, but briefly those are the issues and if you can keep your minds focused on those points then you shouldn't have any difficulty at all in arriving at a just verdict.

And thereupon Mr. Kelly on behalf of defendant stated to the Court and jury its claim and the evidence by which it expected to sustain the same, as follows:

Mr. Kelly: May it please the Court—Ladies and Gentlemen of the Jury,—In a case such as this, the lawyers at the beginning of the trial are permitted to outline to the jury what they think the evidence will be. These opening statements, as they are called are not considered as evidence, not to be accepted by you as proof. The evidence is what is given here in open Court by witnesses who testify orally or by the written evidence which is admitted, given to you for your consideration.

Inasmuch as you have not had occasion to serve as jurors before, I think perhaps your duties might be somewhat lessened if you know at the very beginning of this case what this lawsuit is about. The evidence will unfold it, but for that reason I want to in detail outline to you what the evidence will be insofar as the railroad company in this case.

In 1941 Mr. Dice the plaintiff, the man who brings (11) this lawsuit started to work for this Company as a fireman engaging in both what we call yard work and out on the line, out over the system, or between Delphos and Akron.

On May 30, 1944 he was the fireman of a train crew which had left Akron sometime early in the morning going to Delphos, Ohio.—How far is it from here to Delphos, one hundred eighty-six?—One hundred seventy miles. And Mr. Dice was the fireman. The engine on which he was a fireman was known as Engine 404 and was an engine regularly used by this Company in its road work. The weather was clear, nothing unusual insofar as the weather was concerned, a nice day.

Now, there is a little town out here in western Ohio, called Rushmore, and the main track of this Company runs easterly and westerly through Rushmore. On the southside of this main track at Rushmore there is a sidetrack which goes to the south or left as the train proceeds westerly. This switch track or side track is known as a "beet" track.

On this particular day this train with Engine 404 was being operated in a westerly direction coming into Rushmore. Mr. Dice was seated on the left side of the engine on what we call the seat box, and just as this engine approached or entered upon the point where this switch was located the engine derailed and turned over on its side, and of course the engineer was in the engine and Mr. Dice was in the engine.

Mr. Dice got out of the engine and lent some assistance to the engineer and the others who were there and he apparently was able to be about without too much difficulty, and after some time (12) he went into, was driven into one of the villages in that community for the purpose of taking him to a doctor, went to a doctor and he received some first aid treatment, nothing particularly wrong with him.

Mr. Hatch: Object to that, Your Honor.

Mr. Kelly: That is what we expect the evidence to show, Your Honor.

Then he went over to a bar or a cafe and had a beer or two, then he went over to a rooming house or hotel, went to bed rested a while, got up and went back to a bar or cafe, had a beer or two; and that was sometime during the night. Then he was driven back to Akron in an automobile by one of the Company employees who

had been sent out to render whatever assistance should be rendered to Mr. Dice and other members of the train crew. Mr. Dice was driven out to the East Akron Yards of the Company, he got in his car and drove home during that night. The next day he received a call and was asked by the Company to go into City Hospital for a check-up to see whether he had been hurt in this accident and he was in the hospital a short time and he was examined and taken care of by Dr. R. N. Lemmon of this City. X-rays were taken and no broken bones anything like that found. He was off about two weeks from work, and on the 13th of June, 1944 he was approved for work by Dr. Lemmon and he resumed work as a fireman on the 15th of June and worked during the rest of that month and he also worked on the first three or four days of July of 1944.

Now, on the 14th of June and before resuming his work, he comes down to the Akron office, the downtown office of the (13) AC&Y, and wants to know if he can be paid some money during the time that he is off and he wants to be paid for some—rather, he reimbursed for some injury to some of his property, clothes and things that he had that were damaged in this wreck. So on or about the 14th of June, 1944, the Company gives him by check \$139.66 and they also reimbursed him to the extent of \$84.19 for damage to his clothes and things of that character. That was also by check. Then he had some false teeth that were damaged, injured in this wreck. He asked to have those replaced and the Company arranged to have those replaced and they pay for the cost of replacement.

Then in the first of July, around the 4th of July, he reports—he said he is not feeling very well, and he

wants to lay off. So permission was given to him to lay off for a short time, and then he is off work during the month, practically the entire month of August, if I remember rightly, and at the end of August he comes into the Company and brings with him a statement from his own Doctor, Doctor Schaffner who says he is ready to resume work, and he asked to be put back to work and he is put back to work.

Now, in the meantime, during the month of August when he was off, he made three trips down to the Company office and says he needs some money to live on. And on three separate occasions the Company gives him Seventy-five Dollars or a total of \$225 which he receipts for, and those payments are made by check.

Now, on the 5th of September, 1944, when he comes in with a statement from his own Doctor saying he is ready to (14) resume work—in the meantime, I should say that Mr. Dice had been examined on different occasions by Dr. J. D. Smith of this City who OK'd this man for work. On the 5th of September, 1944 Mr. Dice comes down to the office and says he wants to settle up and on that occasion the Company pays him by check \$475.78, and on that occasion he signs a release,—on the 5th day of September, 1944. He goes back to work on the 5th of September or the next day, 1944, and he works continuously almost every railroad work day up until May 21, 1947,—rather April 24, 1947, over two and one-half years; and he makes more money per month, per year, than he ever made before working for this railroad company. We will show all that.

Now, Mr. Dice belonged to the Railroad Union, and the Company, like all railroad companies, had a contract with the Railroad Union, and under the Company rules

and under the Union rules, Mr. Dice as a fireman was required to take an examination to become an engine-man; and if he failed to take that examination then under the Union rules he would go to what we call the bottom of the list so that would give the other fellow a chance to move up along the lines of seniority and get the promotions that were available.

We expect the evidence to show that in order to become an engineman, he had to take what is known as two types of examination, mechanical examination and transportation examination. The mechanical examination related to the mechanical operation of a railroad engine, and the transportation examination related to books of rules and that was a written examination.

Now, Mr. Dice under the rules of his Union and under (15) the contract between the Union and the Company started to take an examination for an engineman. For some reason or other, he never finished it, never completed it, and then he quit; and on the 21st day of May, 1947, almost three years to the day after this accident he starts this lawsuit to recover \$50,200, claiming—as a result of injuries which he claims he sustained May, 1944.

In our Answer, we have plead specifically, and you will have all these papers in front of you, this release which this man signed, and now he says after three years that release was obtained by fraud,—“you gypped me, you cheated me.”

Now, Ladies and Gentlemen of the Jury, that is what this lawsuit is about, one of the things that is in it. We also expect to show to you by numerous witnesses that this derailment on May 30, 1944 was not the result of any neglect or fault upon the part of this railroad company.

Now, this is going to be rather a long involved affair.

I hope by my opening statement you have some idea of what you are going to listen to. I ask you to keep your minds open, your ears open. I think when we get through, you will understand what has happened, and you will arrive at the right conclusion in this lawsuit.

And thereupon, in order to maintain the issues upon his part to be maintained, the plaintiff offered as a witness himself, JOHN F. DICE, who, being first duly sworn, testified as follows:

(16)

DIRECT EXAMINATION by Mr. Hatch.

Mr. Kelly: At this time, Your Honor, defendant moves for judgment upon the pleadings and the opening statement of counsel for plaintiff.

The Court: Well, I will overrule it at this time.

Mr. Kelly: Exception.

The Court: Consider it later.

Mr. Kelly: At this time the defendant objects to the introduction of any evidence,—

The Court: Yes, sir.

Mr. Kelly: —on the ground and for the reason that the plaintiff does not have a cause of action under the face of the pleadings.

The Court: I think I know what you mean, so I will overrule it at this time.

Mr. Kelly: Exception.

The Court: Go ahead, and see what it is about.

Mr. Hatch: Q. Mr. Dice, will you please speak up

when you answer the questions so that everybody on this jury can hear you.—I didn't hear you? A. Dice.

Q. Will you please state your name? A. John F. Dice.

Q. Where do you live, Mr. Dice? A. 2854 Morrison Street, Ellet District.

Q. That is Akron, Ohio? A. Yes, sir.

Q. What is your business or occupation? A. School cop right now at present.

Q. In May, 1944, what was your business or occupation? A. Fireman on the railroad, AC&Y Railroad.

(17) Q. That is the defendant here? A. Yes, sir.

Q. Akron, Canton & Youngstown Railroad? A. Yes, sir.

Q. How old are you, John? A. Fifty-five.

Q. How old were you when you were hurt?

The Court: You had better say how old were you on May 30, 1944.

Mr. Hatch: Q. Yes, John, May 30, 1944.

The Court: Q. You are fifty-five now? A. Yes, sir.

The Court: Q. When were you fifty-five? A. I was fifty-five last December.

The Court: All right.

A. I will be fifty-six this coming December.

The Court: All right.

Mr. Hatch: Q. Now, you were about fifty or fifty-one, is that right? A. Fifty-one, I figure.

Q. Are you married, Mr. Dice? A. Yes, sir.

Q. Any children? A. Three.

Q. And they are all grown up now, are they? A. Yes, sir.

Q. Who lives with you there at your home?

Mr. Kelly: Object. It is immaterial, Your Honor.

The Court: Sustained. He could be a bachelor.

Mr. Hatch: He said he was married.

The Court: Well, don't make any difference.

Mr. Hatch: Q. When did you start working for the AC&Y? A. June 26, 1941.

Q. And did you have a classification at that time when you hired in? A. I hired in as fireman, because I had (18) fired before.

Q. Had you worked on any railroad before that time? A. Yes, sir.

Q. What railroad and when to your best knowledge?

A. I worked on the B&O in 1917 in the Akron yards.

Q. Where? A. Akron yards.

Q. How long did you work there if you remember?

A. Well, I would say in the neighborhood between three and one-half years to four.

Q. Did you ever work for any other railroad? A. Erie.

Q. Whereabouts? A. Akron yards.

Q. In what capacity? A. Fireman.

Q. Any other railroad? A. Pennsylvania.

Q. As what? A. Fireman.

Q. Just prior to 1941 what was your business or occupation? A. Fireman.

Q. Were you working as a fireman? A. Yes, sir.

Q. Where? A. On the AC&Y.

Q. Before you hired in? A. Oh, before that? Working for myself.

Q. Doing what? A. Trucking.

Q. Where did you go to school, John? A.

Mr. Kelly: Objection. It is immaterial.

Mr. Hatch: It is material later on.

The Court: Well, let's wait until later on, bring it out then. Do not anticipate it.

Mr. Hatch: Q. Now, John, calling your attention to May of 1944, particularly on the 29th or the 30th, were you on duty at that time as a fireman? A. Yes, sir.

(19) Q. And were you assigned a particular run? A. No, I was on the extra-board.

Q. I mean, on that date? A. Yes, assigned to that run that goes out in the morning about two-thirty.

Q. All right. What were you assigned to do? A. Fireman.

Q. What crew—Who was on the crew other than yourself? A. Well, it was, Earl Gable was the engineer.

The Court: Q. Earl who? A. Gable.

The Court: Q. Gable? A. Yes, sir.

The Court: Q. Was that Engine Number 404? A. Yes, sir.

The Court: Q. That was traveling west towards Delphos? A. Yes, sir.

The Court: All right.

Mr. Hatch: Q. All right. Who else was in the crew? A. Chuck Moore, the conductor, and the brakeman, I don't know their name.

Q. Well, did you take that assignment that day? Did you go out of Akron here? A. Yes, sir.

The Court: I don't believe that is in dispute, is it?

Mr. Kelly: No. It is admitted in the pleadings.

The Court: Yes.

Mr. Hatch: Q. All right, John. Will you please tell us what happened? You were going west towards Delphos, is that right? A. I was.

Q. And what time of the day did you arrive, say, at Rushmore, Ohio? A. 10:08 A. M., in the morning.

The Court: Q. 10:08 in the morning? A. Yes.

(20) Q. Now, as you approached Rushmore, will you please explain to the court and jury how fast you were going, the conditions of the day, etc.? Will you just relate to them? A. Well, it was a very nice morning. The sun was coming up nice. It was a nice, clear morning. We were just riding along, see, nice. I was hanging out of the window, and I was figuring that big arm that you see on the locomotive, call that the main rod that goes to the big main pin that drives the locomotive,—I was looking out the window watching that to see how many ties it was from the time it went down until it went up around and come down to a tie again; I was looking out at that, and as—I believe it was seven ties,—just then I happened to look ahead as the engineer reached up to blow the whistle, I seen the little trucks right in the switch—

Mr. Hatch: Q. Just a minute. What little trucks are you referring to? Will you explain to the jury what you mean? A. Them two little wheels at the front end of the engine, that leads the engine.

Q. The pony trucks? A. They call them the pony trucks, and they call them engine trucks.

Q. Now, what is the purpose of those trucks? A. Them is what guides the locomotive on the track.

Q. Now, do they have any driving power themselves? A. No, sir; no, sir. They have none.

Q. Now, what about your duties, is it one of your duties to watch those? A. It is my duty to watch my side of the locomotive in case you have—

The Court: Q. It is your duty to watch your side of (21) the locomotive.

Mr. Hatch: Q. Just answer. Also among your duties is it to watch on your side of the road, the signals?  
A. Yes, sir.

Q. Now, explain to the jury what these signals are, are they lights? What are they? A. Well, yes, they are lights on boards.

Q. All right. What kind and color of lights? A. If you happen to be going down around a curve or something and stop, well, the post on this side—

Q. Just a minute, John. Let's limit this to those signals at Rushmore. Now, what kind of signals are there? A. There isn't any there.

Q. Isn't there a switch signal? A. Oh, yes, a—you mean a switch signal, that you throw the switch. It is red and green. Some of them have yellow. Green at that—your switch, is only for you to go straight ahead. When you get off and throw that switch, throw the light on the top of the switch, you throw red. It shows you are going in to a siding.

Q. Now, on that morning did you notice that signal?  
A. Yes, sir. I noticed that switch.

Q. And what did that signal there at the switch indicate to you? A. Green.

Q. Which meant what? A. Everything was all right to go right straight ahead.

Q. That the switch was closed and you were going down the main—

(22) Mr. Kelly: All right. Move all the answer after the word "green" be stricken and the jury—

The Court: Are you objecting to telling what green means?

Mr. Kelly: The way he puts it; yes. He can tell what he means, but he hasn't said. I made—

The Court: Q. What does the green switch mean that— A. The green switch means that your switch is thrown for straight ahead.

The Court: All right.

Mr. Kelly: No objection to that.

Mr. Hatch: Q. It means it is closed? A. Yes.

Mr. Hatch: Can you hear, Mr. Jones? Can you hear Mr. Dice back here? He does have a pretty good voice. Some of them kind of whisper and the jurors don't get it all.

Q. Now, Mr. Dice, will you please tell the jury what you saw there at that switch after you saw this light green? Now, just tell what you saw there; what happened? A. Well, was looking out there, and I seen the little wheels on the front end of the locomotive, I seen them turn.

Q. Turn where, John? A. Into the switch. And more than that, then the engine turned over on her right side and turned clear around, totally around and headed just the opposite way and rolled over into the field, and as—

Q. Now, wait a minute, please. That switch—your locomotive is going west? A. Yes, sir.

Q. And you were stationed on the lefthand side of the cab? A. Yes, sir.

(23) Q. Which would be on the south? A. Yes, sir.

Q. Now, where was that—that switch on that track? Tell the jury what that was? A. It was on my side.

Q. Tell the jury what it was? A. Yes, was a switch there, a little track, they call it a "beet track," where they—why—pull, put the cars to load up some of

them sugar beets. It just holds, I don't know; two or three cars is all; where you back in, you got to back out again. don't clear on out.

Q. Which way from the main track did that—that switch track go there, that siding? A. Went on the south side, up ahead.

The Court: Q. You mean, to the left then? A. Yes, sir.

Mr. Hatch: Q. Went to your left or to the south? A. Yes, sir.

Q. So that from your side of the locomotive, you had a clear view of that switch? A. Yes, sir.

Q. Had you read the orders that day or seen them or had the engineer told you about them? A. The engineer read them.

Q. Do you know whether or not your orders required you to stop there at that siding? A. No. We had no stop there.

Q. Your orders were to proceed through? A. Proceed through to Delphos.

Q. And not to stop there? A. No.

Q. Now, these small pony trucks or these guiding wheels, you say split that switch there?

Mr. Kelly: Objection. He didn't say that.

(24) Mr. Hatch: Pardon me. Q. What did you say, John? What happened? A. I said I seen the little wheels run into the switch on my side. I could see when they turned.

Q. All right. And what happened to the main wheels? A. They stayed right on the main track.

Q. Then what happened, John? A. She turned over on the right side.

Q. What is "she"? A. Well, we call a locomotive "she." Turned over on the right side and whirled around and headed back east, just the opposite way to what we were going and rolled over in the field.

Q. John, I will hand you what has been marked for identification as Plaintiff's Exhibit 1, and ask you if that picture there, that photograph fairly represented the condition of the locomotive 404 just prior to coming into Rushmore? A. Yes, sir.

Q. As a matter of fact, that picture was taken after it was repaired, though, isn't that right? A. Yes, sir.

Q. I will hand you Exhibit 2, what has been marked for identification as Plaintiff's Exhibit 2,—how does that represent the position that locomotive was in that morning after it turned over on its side? A. Yes, sir, it does.

Q. Now, did you see what happened to some of the box cars or gondolas? A. Yes, sir, I did.

Q. Now, looking at Plaintiff's Exhibit 3, does that photograph fairly represent the condition of—are those gondolas? A. Yes, sir.

Q. Wait—of those gondolas? What is your answer? A. Yes, sir.

(25) Q. Here's Plaintiff's Exhibit 4. Do you know where that was taken? A. Yes, sir, taken out there at the round house, at Brittain—

Q. Does that fairly represent the locomotive right after the accident, when it was hauled back into the roundhouse? A. Yes, sir, it—

Q. Brittain Road roundhouse? A. Yes.

Mr. Hatch: May I show these? Pass them on to the jury.

Mr. Kelly: I would like to have the opportunity to cross-examine on them first, Your Honor.

The Court: Well, they aren't in evidence yet, so—

Mr. Hatch: Q. With reference to your duties as a fireman, did you have any duties in connection with the main building or maintenance of switches or the road-bed? A. No, sir.

Q. Did you have any duties with reference to the condition of the engine or the locomotive? A. No, sir. That is up to the engineer.

Q. Now, who repairs the locomotive if something goes wrong? A. On the road?

Q. Or in the shop? A. Well, they have shop men to do that in the shop.

Q. All right. Now, when you went out this morning, did you notice anything wrong with the locomotive?

Mr. Kelly: Object to the form of the question.

Mr. Hatch: I will withdraw that.

Q. Did you have anything to do with the erection (26) or maintenance of that "beet switch" or that siding at Rushmore? A. No, sir.

Q. What happened to you when that locomotive turned over, John? A. Well, I was throwed all over in the cab as the engine turned over and bounced around, why, I was throwed all over the cab, both of us.

Q. "Both of us," meaning who? A. The engineer and myself.

Q. You were on the lefthand side? A. Yes, sir..

Q. The locomotive turned around, completely around, fell on its right side, is that correct? A. Fell on the right side, then turned around.

Q. Which means that you went from the lefthand side down at the bottom of the heap, is that it? A. Yes, sir, that is it. Then—

Q. Then in that position what happened to you?

A. Well, as she turned around, the seat boxes,—we call them seat boxes, that you sit on, one for the engineer and one for the fireman—We keep tools and stuff like that. Them boxes bounced around. We were bouncing around with them while the engine turned around and turned around. I was all bruised up from one end to the other.

Q. When the locomotive and you came to rest, how did you get out of there, John? A. Crawled up out of that little window.

Q. On your side? A. On my side.

Q. The other window was on the ground, wasn't it?

A. The other window was on the ground, yes, sir.

Q. Do you know how Gable, the engineman, got out of (27) there? A. No. No.

Q. How did you get out, just tell the jury. A. I crawled up out of that window on my side, crawled down over. When I crawled down over the back end of the engine, I was scared, I was in a hurry to get out, afraid it was going to blow up or something. As I crawled down, I got caught on the side of the engine.

Q. Where? A. On my side. Then I laid down on my belly and crawled out, because there was so much steam and hot water flying around. I crawled on my stomach, crawled out. I looked for the engineer; couldn't see him because I couldn't see nothing for steam. Finally he got out on this side. Then he said to me—

Mr. Kelly: Objection.

Mr. Hatch: Q. Not what he said, John.

Q. How long—Then you looked it over, what had happened to the engine? A. Yes, sir.

Q. You looked over what had happened to some of the box cars? A. And gondolas.

Mr. Hatch: Q. The reporter can't get a nod of the head. You will have to say "I did." What is your answer?

Thereupon the reporter read the last question to the witness.

A. Gondolas, in other words.

Mr. Hatch: Q. And you saw those? A. I saw those.

Q. All right. How long did you remain there at the scene? A. Well, we didn't stay there. The conductor came along and seen what happened, and he took both of us up to the read crossing and a bunch of people come around there and (28) some men took us in an automobile over to Delphos to the Doctor over there.

Q. Was the doctor there? A. No, sir.

Q. Did one finally come? A. Yes, they got a doctor from another little town there somewhere.

Q. What, if anything, did the Doctor do for you? A. Well, the Doctor he—I was laying down on one of these old-fashioned couches. As quick as he come in, the nurse she had the engineer wash up, he was bleeding so. So he looked over at me, he says, "I will take this man first." So he took the engineer and worked on his face right away. Then he came over, he examined me; and I told him, I said, "I am sore in here, sore in my ribs, and around." He said, "Well," he said—

Mr. Kelly: Objection.

Mr. Hatch: Q. He examined,—he examined you?

A. Yes, sir.

Q. What then did you do? A. After we got through there, why I went across the street and went in to a saloon and got a beer or two. Then I went up in to my room and went to bed.

Q. Did you have a rooming house there where you regularly stayed? A. Yes. There is a lady that has a big house, and she lets rooms out to the railroaders.

Q. You went to bed? A. Yes, sir.

Q. Do you remember what time that was, about?

A. Oh, I would not say just offhand. Around eleven-thirty, twelve o'clock.

Q. Then you did what? A. I went up to my room in the (29) house and went to bed.

Q. How long did you go to bed? How long did you sleep, if you slept. How long were you in the room approximately? A. Oh, I was in until evening anyhow.

Q. Then what did you do? A. Well, I got up and went up and got my supper up at the restaurant.

Q. How did you get back to Akron? A. The Detective of the AC&Y brought us back.

Q. Who do you mean by "us"? A. The engineer and me.

Q. Then you got back to Akron about what time if you remember? Early the next morning? A. Yes. I would say around oh—one, two o'clock, just offhand, in that neighborhood.

Q. All right. When you got home what did you do? A. Well—

Q. When you got back to Akron? A. Well, he took the engineer home first, and he said, "Do you want me to take you home?" And I said, "No," I said, "I have got a car," and he said, "Are you sure that you are able to drive the car home?" And I said, "Yes." I said, "The traffic ain't heavy now. I will just take my time to get my car home, and I will go on home."

Q. Did you do that? A. I did, sir.

Q. When you got home what did you do? A. When I got home, got ready, washed up, and went to bed. And my wife, she,—I think she went and got me a hot water bottle put to my side when I went to bed.

Q. Just explain to the jury how you felt? A. Well, I felt sore. I was sore over all on ribs and side. I was, just (30) the whole body was sore and bruised up.

Q. And the next morning you went to the City Hospital, is that correct? A. Yes, sir.

Q. The next morning before you went to the City Hospital did you notice anything unusual? A. Well, I did, yes. When I went to the bathroom I noticed things unusual.

Q. Well, what? A. Well, there was blood passed.

Q. All right. And did that occur more than once?

A. Yes, sir.

Q. For how long did that— A. It occurred either two or three times.

Q. In the next few days? A. Yes. In the hospital, yes. While I was in the hospital.

Q. All right. You went to the City Hospital? A. Yes, sir.

Q. And did some doctor examine you there? A. Yes, sir, the Company Doctor, Dr. Lemmon.

Q. What, if anything, did he do for you? A. Well, he didn't do anything. He was just—He said that he was watching; watching me on account of the blood passed, and he just had me in there to or as a—whatever you call it, for a couple of days.

Q. Observation? A. Observation for a couple days. I was in there about a week, I think.

Q. All right. Were X-rays taken? A. Yes, sir, they were.

Q. I understand they showed no broken bones? A. No, sir.

Q. Now, did he give you any medicine or sedatives, (31) sleeping pills, or anything like that? A. Well, he gave me, they gave me some medicine there when they took pictures of me, some white stuff and black.

Q. Anything other than that? A. No.

Q. You went home then after you had been at the hospital a few days, is that correct? A. Yes, sir.

Q. How long did you remain away from work? A. Oh, I think it was about the 15th of June.

Q. That was about fifteen or sixteen days, is that correct? A. Yes.

Q. Do you have a record here of your—of the time when you worked and when you didn't work, when you were off? A. Yes, sir.

Q. All right. You went back to work then in June? June 15, 1944? A. Yes, sir.

Q. Now, to refresh your recollection, would you tell the jury then from your notes or your records there when—how long you worked after June 15th? A. Well, I was off on July 6th to September the 7th, in 1944.

Q. So then you worked from June 15, 1944 to July the 6th, 1944? A. Yes, sir.

Q. Then you were off from July 6th to September 7th, 1944, is that correct? A. Yes, sir.

Q. Why did you—Did you report out July 5th or 6th? A. I reported off.

Q. And what did you, when you reported what—  
A. I told them that when I would report off, I would report off that my side hurt me so bad.

Q. Had that side ever hurt you before this locomotive (32) turned over? A. No, sir.

Q. What was the general condition of your health before this locomotive turned over? A. Good.

Q. Did you ever have any major sickness or disability? A. No, sir.

Q. Had your employment been steady? A. Yes, sir.

Q. So on July 6th, you reported off? A. Yes, sir.

Q. To your employer, the AC&Y? A. Yes, sir.

Q. You were off then until September 7th, 1944? A. Yes, sir.

Q. Now, again, referring to your records, when were you off any more after that? A. I was off from September 25th to October the 2nd, but that was on vacation.

Q. In other words, it was your vacation period? A. Yes, sir.

Q. So you went back then in October, 1944? A. Yes, sir.

Q. Now, after that were you off any— A. I wasn't off until February 2nd, 1945 until February 23rd.

Q. So you were off then three weeks? A. Yes, sir.

Q. Now, did you report off that time? A. Yes, sir, every time.

Mr. Kelly: Q. What year was that? A. 1945.

Mr. Hatch: Q. Now, what was the reason at that time? A. I had—

Mr. Kelly: Objection.

A. Because of my side aching.

The Court: Q. Reported off for what, massages?

(33) Mr. Kelly: I move that the answer go out. He is drawing his own conclusion.

A. On account of my side hurting me.

Mr. Hatch: He isn't drawing.

The Court: Q. Who did you report off to?

Mr. Kelly: Yes.

A. I reported off to whoever is at the desk there at the railroad yard.

The Court: Q. You don't know who it is directed to? A. You talk to different ones of them that answers the 'phone in the office.

Mr. Hatch: Q. Is that the yard master or assistant yard master? A. Yes, sir.

Q. Do you recall who you talked to then on that day? A. No, I can't.

Q. What was your—Did you have any sensation on February the 1st or 2nd? What was your physical condition then? Did you have any sensation at that time?

A. Well, I got—I got such a pain in my side and I reported off. Called them up at the office and told them that my side hurt, said, "I can't take my run." They said, "All right, Dice. We will report you off until you report back on again."

The Court: Let's have a recess now. I think it is too hot. With the usual admonitions, we will have a recess.

(Recess.)

Mr. Hatch: If Your Honor please, I called Dr. Terwilleger.

(34) The Court: Isn't he here yet?

Mr. Hatch: I called at half past. He has to come from Goodyear Boulevard.

The Court: Let's wait until he gets here.

Mr. Hatch: Your bailiff is determining that fact.

The Court: We will take care of him when he gets here.

Mr. Hatch: All right.

The Bailiff: He hasn't arrived yet.

(And thereupon Mr. DICE returned to the witness stand for further direct examination by Mr. Hatch.)

Thereupon the reporter read the last question and answer, just before the recess.

Mr. Hatch: Q. Then I believe you stated you went back to work February 23rd, 1945, is that correct? A. Yes.

Q. Speak, up, please. Now, after this locomotive upset did you ever go back on that run to Delphos? A. Yes, a couple of times.

Q. And only two times? A. Two times as far as I can recollect.

Q. Will you tell the jury what happened on those trips?

Mr. Kelly: Objection.

The Court: I will sustain it. I haven't any way of knowing what he is going to say. Apparently wouldn't be competent unless it is something special.

Mr. Hatch: Q. Well, did you have any sensations while you were on those two runs?

(35) Mr. Kelly: Objection.

A. Yes.

The Court: Q. Sensations? Answer yes or no. A. Yes, sir, I said.

Mr. Hatch: Q. What were those sensations?

Mr. Kelly: Objection. I don't know what he is driving at.

The Court: Well, we will find out what the sensation is.

Mr. Hatch: Let him answer, you will find out.

Mr. Kelly: It may be proper. It might be improper. I don't know what he is going to say.

A. Well, I was awful nervous and sore on them two trips. The second trip, I couldn't hardly make it back because I got so nervous that I just held my head out of the window and vomited until I got right into the yard.

Mr. Kelly: / I move—

A. I had to look up at the steam gauge and keep watching the steam gauge. The minute I would look outside, I would have to vomit.

Mr. Kelly: Move the entire answer go out; the jury be instructed to disregard it.

The Court: Oh, let it stand for what it is worth.

Mr. Hatch: Q. John, will you look at your time-books. Do you have those with you? A. Yes, sir.

Q. May I see the one for 1945? (Witness producing book for attorney.)

Q. It is the one after this. A. Oh.

(36) Q. During this time, between September 7th and February 23rd, 1945, were you going to any doctor or physician? A. Yes, sir.

Q. Who? A. Dr. Schaffner.

Q. Dr. Schaffner? Is that correct? A. Yes.

Q. Speak up? A. Yes, sir.

Q. Boyd W. Schaffner? A. Yes, sir.

Q. M.D.? A. Yes, sir.

Q. Did he have an office somewhere? A. Yes, sir. He had an office over there on Canton Road and Ellet.

Q. That is near where you live? A. Yes, sir.

Q. Had he treated you or members of your family before this occurrence in May? A. He did.

Q. He was your family physician, is that correct? A. Yes.

Q. In February of 1945, were you visiting Dr. Schaffner? A. I did.

Q. And why? A. Well, he was treating me for my—for my pain, for my side and for my back.

Q. Now, you mentioned your back. Had you had trouble with your back prior to the accident? A. Since the accident.

Q. Before? A. No, sir.

Q. What did Dr. Schaffner do for you? A. Well, he—he put me under an electric machine and that he hooked a while back—back of my neck here and then he put one over on the side there and let me lay there and turn electric on.

Q. Did you take any medicines? A. I did.

Q. At whose direction? A. By his directions.

(37) Q. Dr. Schaffner's? A. Yes, sir.

Q. I will call your attention to March of 1945, can you check your book to determine whether you were off in March? Will you check your book there? Now, the books you are referring to there are what? A. Them books that I kept my time in from day to day.

Q. Did you make those notations each day? A. Every night or every day when I came in.

Q. All right. A. What date did you ask?

Q. In March of 1945, around the middle of March? A. Yes. I was off. I was off for about, about a week there.

Q. What dates? A. From the—from the 17th to the 19th.

The Court: Q. What year was that? A. 1945.

Mr. Hatch: Q. March? A. March—From the 19th to the 27th, I meant to say.

Q. Speak up and tell. A. 19th to the 27th.

Q. All right. What was your condition of your health at that time? A. Not good.

Mr. Kelly: Move the answer go out, the jury be instructed to disregard.

The Court: Sustained.

Mr. Hatch: Q. What do you mean, did you have any sensation? A. Yes. I had pain in my side, and my back hurt when I laid off.

Q. Now, calling your attention to January, 1946, were you off from work at any time that month? A. I was off from January 8th to January 16th, in 1946.

(38) Q. And did you report off? A. I reported off sick.

Q. Were you having any sensations at that time? A. Yes, sir, I did. My back and side.

Q. Well, what about them? A. Well, just hurt so bad that I couldn't ride the engine. My side hurt me so bad.

Mr. Kelly: Move the answer go out—

A. And my nerves.

Mr. Kelly: —and be instructed to disregard.

The Court: Well, I guess it may stand.

Mr. Hatch: Q. I believe you worked from January 16th, 1946 to the first part of 1947, is that correct? A. First of February.

Q. With the exception of perhaps a vacation period in there? A. Yes.

Q. What did you say? A. Yes, sir.

Q. Speak up. A. Yes, sir.

Q. Because this young lady is taking down the record. All right, what happened February 1st.

The Court: What year?

Mr. Hatch: 1947. 1947. A. Well, I was off from February 1, 1947 to February 6, in 1947. Laid off sick.

Mr. Kelly: February what? A. February 1st to February 6th in 1947.

Q. Then you worked until when, John? A. April 13th in 1947 to April 22, 1947.

Q. Did you report off that time? A. Yes, sir.

Q. And were you having any sensations at that time? (39) A. Yes, sir. I did.

Q. Were you? What were those sensations? A. Well, my side and my back and awful nerves—nerves in my stomach.

Q. Were you seeing a doctor? A. Yes, sir.

Q. Who? A. Well, I seen Dr. Schaffner.

Q. I believe Dr. Schaffner is dead, is he not? A. Yes, sir, he is.

Q. Died in the latter part of 1947? A. Somewhere along in there.

Q. Did you see him on occasion up until he died?

A. Yes, sir.

Mr. Hatch: Dr. Terwilleger is here if we could call him.

The Court: All right.

Mr. Hatch: Will you step down a moment, John?

And thereupon, in order to further maintain the issues upon his part to be maintained, the plaintiff called as a witness one Dr. WILLIAM C. TERWILLEGER, who, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Hatch.

Q. Your name is Dr. William C. Terwilleger? A. Yes, sir.

Q. Where do you live, Doctor? A. 40 West Linwood.

Q. In Akron? A. Yes.

Q. What is your business or occupation, Doctor?  
A. Physician.

Q. An M.D.? A. Yes, sir.

(40) Q. Do you have an office, Doctor? A. Yes,  
sir.

Q. Where is that located? A. 3 Goodyear Boulevard.

Q. In the City of Akron? A. Yes, sir.

Q. Where did you—Are you admitted to practice in the State of Ohio, Doctor? A. Yes, sir.

Q. How long have you been admitted to practice?  
A. Since 1921.

Q. And how long have you practiced in and about Akron, Ohio? A. Sir?

Q. How long have you practiced in and about Akron, Ohio? A. Since 1921.

Q. Where did you take your training, Doctor? A. Graduated from Chicago College of Medicine and Surgery in 1915; served internship in Francis Willard Hospital in Chicago until 1916. Doctorship in Iowa until 1918; served in Presbyterian Hospital, Pittsburgh, Pennsylvania, until 1920; served in Peoples Hospital in 1920, 1921.

Q. Thereafter you were in private practice? A. Sir?

Q. Thereafter you were in private practice? A. Yes, sir.

Q. In Akron? A. Yes, sir.

Q. I am speaking loud so that this Mr. Jones back here, the last gentleman back here, can hear my questions and answers. Are you acquainted with John F. Dice?

A. Yes, sir.

Q. He is the man sitting here, is he not? A. Yes, sir.

Q. When did you first see Mr. Dice? A. March 1, 1949.

Q. And did you have an occasion to examine him, Doctor? A. Yes, sir.

(41) Q. Did he give you a history? A. Yes, sir.

Q. What was that history?

Mr. Kelly: Objection.

The Court: Well, it might be competent and might not.

Mr. Kelly: That is right.

Mr. Hatch: Well, it is to be used for basis of assisting him in making a diagnosis, not as original evidence.

The Court: Well, it might be competent and it might not.

Mr. Kelly: I have no objection to the history insofar as it relates to any physical disability, any pain, anything like that, Your Honor. It is perfectly proper.

The Court: Well, it would depend on what he examined him for and what he did.

Mr. Kelly: Yes, I don't know.

Mr. Hatch: Did the Court rule?

The Court: Well, I will sustain the objection to the history at this time unless I know what it is about and limit it.

Mr. Hatch: We save our exceptions.

Q. Did you make a record, Doctor, of the visits, and this first examination? A. Yes, sir.

Q. Did you bring that with you? A. I did.

Q. Now, you made—Did you make an examination of Mr. Dice? A. Yes.

Q. Physical examination? A. Yes.

Q. And did he complain to you of any sensations?

A. Yes, sir.

(42) Q. What were those? A. He complained of pain in the abdomen and in the back and in the right—in the left hip.

Q. Now, did you—you say you did make a physical examination? A. Yes.

Q. How did you do that, Doctor? A. I had the patient take off his clothes and he laid down on the examining table, and I examined the abdomen by the palpation method.

The Court: Q. When you say abdomen, you have reference to all the abdomen? A. Yes.

Mr. Hatch: Q. All right, Doctor. Anything else? Did you take his pulse, weight or anything? A. I didn't hear it all.

Q. Did you do anything else? Did you take his pulse or blood pressure, check his weight or anything?

A. Could I read my notes on that?

Q. Yes, if it will refresh your recollection. A. March 1st, 1949, present complaint: Pain in the—in his side, the abdomen and side, lower left. Examination: sore and tender in lower left. Patient claims he had wreck and train upset near Delphos, locomotive turned over, patient worked some off and on but could not take it. Treatment: Gelperin pain tablets, two tablets twice daily, Pheno-barbital, one-quarter, three times daily. Come in next Saturday, March 5th.

Mr. Kelly: Wait. Move all the answer starting with the word "patient claims" be removed from the answer and the jury instructed to disregard.

(43) The Court: It is a little hard to separate it. I think I will be safe with it and sustain it. Why don't you ask this man what his examination disclosed?

Mr. Hatch: Q. Doctor—Doctor, what did your examination disclose?

The Court: Q. What did you find when you examined? A. On physical examination?

The Court: Q. Physical. A. I found that the patient was very tender to pressure, examination in the lower left abdominal region, known as the groin. I found—

The Court: Q. Left groin, in other words, you are talking about? A. Yes. I found a tumorous mass which was hard and easily outlined. On further examination, comparable to the examination, on the right side the same physical findings did not show up. The patient complained of pain in the back and pain in the left hip. I made repeated examination of this patient.

Q. Pardon me. Go ahead. A. I made repeated examination of this patient. Examined the heart, chest, lungs, which were found negative.

The Court: Q. In other words, nothing wrong there? A. No, sir. And examined the lower left abdominal region nearly every time the patient come to my office, and found the same tumorous mass in the same place. The patient flinched and complained severely when I touched and examined this part of the body. The patient claimed that it hurt him for days after the examination.

Mr. Hatch: Q. Now, Doctor, that is the clinical examination, (44) is it? A. Well, that isn't all.

Q. All right. A. I found the patient to be nervous. In his movements and his speech and his action, he was nervous.

Q. How did you treat that particular affliction? A. The treatment for that nervousness was nerve medicine. One tablet three times daily, the medicine known as Pheno-barbital.

Q. Now, from your examination and the symptoms would you say that those symptoms necessarily caused any sensations insofar as he was concerned?

The Court: What caused sensation?

Mr. Hatch: Or pain.

The Court: What causes pain?

Mr. Hatch: Q. The examination, then your diagnosis and this mass and this pain in the back. Now, would that cause a pain just momentarily or would that be a more or less chronic condition?

The Court: Well, I will sustain it. Be definite what you think caused pain.

Mr. Hatch: All right. Q. Was Mr. Dice suffering from pain? A. Yes.

Mr. Kelly: Wait. Objection.

The Court: Q. You may answer that.

Mr. Hatch: Q. What would cause that pain?

Mr. Kelly: Objection.

The Court: He may answer if he knows any condition there that would cause pain.

A. No.

(45) The Court: Q. The answer is, you don't know, Doctor? A. That is right.

Mr. Hatch: Q. How many times have you seen him? A. I saw Mr. Dice on March 1st, March 5th, March 12th, March 19th, April the 2nd, April 9th, May 23rd, May 19th, August 23rd, September 12th, September 24th, October 8th. I did not make a record every time the patient came in; he would come in, get some medicine.

Once I left—once I left the medicine on the window sill for him.

Q. Now, on those occasions did you make a physical examination of him? A. I made a physical examination numerous times but not every time he came in.

Q. Now, did those examinations disclose the same condition? A. The result of the examination disclosed the same condition with reference to the mass in the abdomen and the neurosis.

Q. Well, was Mr. Dice's condition, in your judgment, an efficient and producing cause of pain?

Mr. Kelly: Objection. He has answered that once.

The Court: Yes.

Mr. Kelly: Said he didn't know.

The Court: He told you what the patient told him.

Mr. Hatch: Q. Well, you know, Doctor, that condition there—did that condition in his back and in his side, would that produce pain?

Mr. Kelly: Objection.

The Court: What condition?

Mr. Hatch: The condition he found in the lower groin and in his back.

(46) The Court: Q. You testified, Doctor, the patient told you he had pain, didn't you? A. Sir?

The Court: Q. You testified that the Doctor told you he had pain—

Mr. Kelly: Q. The patient, Mr. Dice, said he had pain? A. Yes.

The Court: Q. You testified Mr. Dice told you he had pain? A. Yes.

Mr. Hatch: He can't answer my question then?

Witness: What is the question?

The Court: If you make it specific, he can answer it maybe.

Mr. Hatch: I limited it to the lower left groin and to his back.

Mr. Kelly: May we have—

The Court: No. Q. You talk about a condition?

A. Yes.

Mr. Hatch: The condition he found, the Doctor found.

Mr. Kelly: Object.

Thereupon the reporter read the last question propounded by Mr. Hatch, as follows: "Q. Well, you know, Doctor, that condition there—did that condition in his back and in his side, would that produce pain?"

A. Yes.

Mr. Kelly: Move the answer go out, the jury be instructed to disregard it.

The Court: Let it stand.

Mr. Hatch: Q. Doctor, do you know generally what the duties of a railroad fireman are? A. Yes, sir.

(47) Q. On a steel locomotive? You know he has to shovel coal? A. Yes, sir.

Q. Now, assuming that Mr. Dice was a railroad fireman in the employ of the Akron, Canton & Youngstown Railroad and had among those duties to shovel coal and throw it into the firechute, do you have an opinion as to whether or not John Dice could carry on those duties when you first saw him in March of 1949?

Mr. Kelly: Objection.

Mr. Hatch: Q. You can answer that yes or no, whether you have an opinion. A. Yes.

Mr. Kelly: Wait a minute. The Court hasn't ruled.

The Court: Well, I don't see any objection.

A. Yes.

Mr. Hatch: Q. What is that opinion?

Mr. Kelly: Objection.

The Court: Q. You may answer.

Mr. Kelly: Exception.

A. He could not.

Mr. Hatch: Q. Upon what do you base that opinion, Doctor?

Mr. Kelly: Object. Now, he has a conclusion in his hypothesis. That is just the very basis of the objection.

Mr. Hatch: I will withdraw that question.

Q. That question was limited to the first time you saw him. Now, when did you examine him the last time?

The Court: October.

Mr. Kelly: October 8th, he said.

(48) The Court: October.

A. October 8th.

Mr. Hatch: Q. All right. Do you have an opinion now or as of October 8th as to whether or not John Dice could carry on the duties of a railroad fireman?

Mr. Kelly: Objection.

The Court: You may answer.

Mr. Kelly: Exception.

A. Yes.

Mr. Hatch: Q. What is that opinion?

The Court: You may answer.

Mr. Kelly: Exception.

A. He could not.

Mr. Kelly: Move the answer go out; the jury be instructed to disregard it.

Mr. Hatch: Was there a ruling?

The Court: Oh, overruled.

Mr. Hatch: Q. Would this condition you found cause any loss of sleep in your opinion, Doctor?

Mr. Kelly: Objection.

The Court: I wish you would find out what the condition is you are talking about. That is what I would like to know.

Mr. Hatch: John,—I would like permission to have John stand up and have the Doctor come over here and point out where these things were.

The Court: All right.

Mr. Kelly: Your Honor, he said he found a mass in the (49) lower left quadrant.

Mr. Hatch: Let's get this—Stand up.

Mr. Kelly: Wait a minute. I object.

The Court: Q. Do you have any idea how long the mass has been there? A. No, sir.

The Court: Q. Do you know what the mass is? A. No, sir.

The Court: Q. It is in the groin? A. Yes, sir.

The Court: Q. How large is the mass? A. It is four inches long or longer and an inch thick or wide, approximately.

The Court: Q. Of course, you have no way of knowing how that mass occurred or what caused it, have you? A. No, sir.

The Court: Q. But you do say that mass was there in March of 1947?

Mr. Kelly: 1949.

A. 1949.

The Court: Q. 1949, rather, when you first saw him? A. Yes.

The Court: Q. Well, that mass wouldn't prevent him from sleeping, would it? A. It might.

The Court: Q. You couldn't say with reasonable medical certainty that that would stop him from sleeping? A. No.

The Court: Q. You made no diagnosis as to what that mass was? A. I can't answer that question.

The Court: Q. You can't answer that? A. No.

The Court: Q. What you mean by that is, you didn't make a diagnosis of that?

(50) Mr. Hatch: I think, if Your Honor please, in propounding the hypothetical question based on things in the evidence that will be adduced here, some of it has already come out and some of it will be brought out later.

The Court: I may have let too much in already. I don't know. I am through.

Mr. Hatch: I would like to have the Doctor come over and point out to the jury where that is.

The Court: He told you it was on the left groin. You are not going to show the man's left groin, are you?

Mr. Hatch: No. I don't think that is proper. Must be made certain here.—I would like for the record to show that I except to the Court's ruling in not permitting the Doctor to point out to the jury the injury he found on plaintiff.

The Court: I don't think there would be any trouble in the jury knowing where the left groin is. In fact, I did get it described.

Mr. Hatch: Q. Doctor, Mr. Dice, I believe told you that he had been in the accident when a locomotive turned over, back in May of 1944?

Mr. Kelly: Objection.

The Court: Sustained. It is purely hearsay what he told him about the accident.

Mr. Hatch: Q. Well, Doctor, assuming that prior to May 30, 1944, Mr. Dice had been enjoying good health, that he had never had any injury or trouble with his lower left abdomen or groin and had never experienced any pain in his back, and had not been nervous or suffering any neurosis, that on (50) that day, the 30th of May, 1944, he was acting as a fireman on a locomotive owned by the Akron, Canton & Youngstown Railroad and that as they approached Rushmore, Ohio, going in a westerly direction that locomotive jumped the track, turned around facing an easterly direction and fell on its right side; Mr. Dice having been riding on the lefthand side of that cab; that he was violently thrown about the inside of that cab, landed down at the bottom on; the right side was on the ground; that he sustained bruises and contusions all over his body, particularly in his back or in the lower left abdomen or groin; that thereafter he was hospitalized for a few days, X-rays taken which showed no broken bones; that thereafter he remained home so that he was off work for a period of about fifteen days; that thereafter until April of 1947 he was off a total of about one hundred twenty-eight days, and that up until April 24th,—that after April 24th, 1947 was unable to work in his capacity as a fireman and that he did no work at all until September, 1948 when he got a job as a school policeman working a few hours a day when school was in session; and that during this period, all during this period he was treated by Dr. Boyd W. Schaffner who died, I believe last fall, the fall of 1948;— Doctor, can you state

with reasonable certainty whether the injuries he received in the locomotive was a competent producing cause of the injuries or the condition that you found?

Mr. Kelly: Objection.

The Court: Well, I think there is a lot of things wrong but I can't put my finger on it. There are some things there I don't even remember in the evidence.

(52) Mr. Hatch: If the Court please, they will be later,—as you know, we have taken the doctor out of turn.

Mr. Kelly: The Doctor has already said, Your Honor, in response to a question by Your Honor he does not know how long the mass was there or what caused it.

Mr. Hatch: You must assume it wasn't there before.

Mr. Kelly: Well, we have no right to assume anything.

The Court: What right have we to assume it wasn't there?

Mr. Kelly: Yes.

Mr. Hatch: We will bring it up later. He testified he never had any trouble before.

Mr. Kelly: Here's a man that—

The Court: All right. Go ahead.

Mr. Kelly: Here's a man, the Doctor, brought in after almost five years after an occurrence—

The Court: Yes.

Mr. Kelly: And has already stated, Your Honor, that he does not know what caused the mass which he found and which he has described.

Mr. Hatch: Mr. Kelly, you have a right on cross examination.

Mr. Kelly: I have a right to object to the question and indicate to the Court my reasons for the objection and that is what I am attempting to do.

The Court: I am going to sustain it.

Mr. Hatch: Except. (Proffer: Expected the Doctor to respond that the injuries received in the locomotive on May 30, 1944 would be a competent producing cause of the condition (53) he found in his various examinations of the plaintiff, John F. Dice.)

Mr. Hatch: Q. Doctor, you know what trauma is, do you not? A. Yes, sir.

Q. Will you tell this jury what we mean by trauma?

A. Trauma means injury. If a person gets hit on the arm and it turns black and blue, we speak of that in medicine as a trauma. You can have trauma of the muscles or you can have trauma of the bone. You can have trauma of the nervous system. You can have trauma of the brain. You can have trauma of any part of the body.

Q. All right. Could this mass that you found in the groin be caused by trauma?

Mr. Kelly: Objection.

The Court: Sustained.

Mr. Hatch: Except.

Q. You mention that the plaintiff, John Dice, was suffering from nervousness? A. Yes, sir.

Q. Now, could nervousness be caused by trauma?

Mr. Kelly: Objection.

The Court: "Could nervousness be caused by trauma,"—you may answer that. A. Yes, sir.

Mr. Hatch: Q. There is such a thing as traumatic—what do you call it? A. Traumatic neurosis.

The Court: Q. Traumatic neurosis is an entirely different thing from this condition, isn't it? A. No, sir.

The Court: Q. That is a hysteria, isn't it, Doctor? (54) A. No, sir.

The Court: Q. You are sure of that? A. Yes, sir.

The Court: Q. There is a difference between traumatic hysteria and traumatic neurosis? A. Well, there is no traumatic hysteria but there is traumatic neurosis.

The Court: Q. There isn't traumatic hysteria? A. No, sir.

The Court: Q. What is a traumatic neurosis? A. Traumatic neurosis is an injury to nervous system from fright, fear, worry, like a train wreck.

The Court: Q. It is just a nervous condition? A. That is what is known in medicine as traumatic neurosis.

The Court: Q. You wouldn't have traumatic unless you had an impact, blow or injury? A. You can have traumatic neurosis without an impact or blow. In fact—

The Court: Q. Then if there isn't any injury then it is a hysteria, isn't it? A. In fact that is—

The Court: Q. It is, isn't it? A. What is the question, please?

The Court: Q. I say, if there isn't any impact or injury to the muscles, the ligaments or the bones, then it is a hysteria, isn't it? In other words, a person thinks they are hurt, believes they are hurt, but there isn't any actual injury? That is a traumatic neurosis or a traumatic hysteria, isn't it? A. No, sir. If a person thinks they are going to be hurt, they are fearful that they will be hurt, that can affect the nervous system and is known in medicine as traumatic neurosis and is not related to hysteria.

(55) The Court: Well—

Mr. Hatch: Q. Do you diagnose Mr. Dice's condition a nervous condition? A. Yes, sir.

Q. What was your diagnosis as to that?

Mr. Kelly: Objection.

The Court: Q. Well, answer what was his condition as of the time you examined. A. In respect to his nervous condition, he had a traumatic neurosis.

Mr. Kelly: I move the answer go out, Your Honor. Just checking the Petition here, there is no claim of neurotic neurosis. It isn't claimed in the petition. Move it go out.

The Court: Sustained. Because I think the Court knows what traumatic neurosis it. I know it is not pleaded here.

Mr. Hatch: If Your Honor please, I believe it is in the Petition.

The Court: No. I didn't see it.

Mr. Hatch: If the Court wishes it spelled out in that language, I would like leave to amend. I think we have here severe traumatic shock; perhaps I didn't put it in the best medical term, but I think that covers it. It is in the Petition.

The Court: Well, that isn't traumatic neurosis.

Mr. Hatch: It seems to be a medical dispute between the Court and physician.

The Court: Clearly—

Mr. Hatch: Would the Court like to testify?

The Court: If you would like to have me.

Mr. Hatch: I sure would—I believe that is in there, and I wanted to call your—attention of the Court to that and (56) have him reconsider that last objection.

The Court: Well, shock. He could have had shock, traumatic shock. Sure he could have it. Insofar as you are talking about traumatic shock, you plead it.

Mr. Hatch: It is in there.

The Court: Yes, it is in there.

Mr. Hatch: If the Court believes it should be amended, I ask leave of the Court to insert it by interlineation after—

The Court: Well, you had better give that some consideration tomorrow, whether you want to amend that pleading or not.

Mr. Hatch: Shall we—

The Court: As far as evidence on traumatic shock is concerned, that is all right.

Mr. Hatch: Shall we pass that by at this moment?

Q. Doctor, is there any difference between traumatic neurosis and traumatic shock? A. No, sir, except as to time.

Q. What do you mean? A. Traumatic shock would be immediately at the time of injury; traumatic neurosis might show up a day later or a year later.

Q. Now, from the history that I gave you before in my hypothetical question and the fact that he sustained some injuries in May, would he have suffered traumatic shock then?

Mr. Kelly: You mean as of May, 1944, is that what you mean, Mr. Hatch?

Mr. Hatch: Right.

Mr. Kelly: Well, then I don't object to that if it is confined to traumatic shock.

Mr. Hatch: Why are you objecting?

(57) Mr. Kelly: I am not objecting. I just want clarification on the question.

Mr. Hatch: Q. You may answer.—Read the question.

And thereupon the reporter read the last question put to the witness, as follows: "Q. Now, from the history, that I gave you before in my hypothetical question and the fact that he sustained some injuries in May, would he have suffered traumatic shock then?"

Mr. Kelly: I will object to the form of the question, Your Honor. It may be properly stated:

The Court: He is talking about something way back in May, 1944?

Mr. Kelly: That is right.

Mr. Hatch: I want to follow that question up. I would like—

The Court: He said would he have? Of course, I think the question is objectionable with that language in it.

Mr. Hatch: I will state it this way: Do you have an opinion, Doctor, as to whether or not John Dice did have a traumatic shock?

Mr. Kelly: Now, object unless he fixes a time and ties it in with something else now.

Mr. Hatch: I did. I said in May, 1944.

The Court: All right.

Mr. Kelly: If that is what he means.

The Court: Confine it to that.

A. Yes.

Mr. Hatch: Q. What is your opinion? A. He would have.

(58) Q. Now, as a result of that traumatic shock and from your examination would that cause this traumatic neurosis that you found Mr. Dice suffering from?

Mr. Kelly: Object to the form and competency of the question, and its admissibility, also, under the pleadings.

The Court: I am going to sustain it under the pleadings.

Mr. Hatch: Except and (Proffer: Expect the witness to testify that it would).

Q. Now, Doctor, assuming that John Dice was injured in 1944, May of 1944, when a locomotive turned over and he was bounced all around the inside of the cab and sustained some injuries, and thereafter had to stay off work for a long period of time in 1944, and that after September, 1944, he had to stay off work for about one hundred twenty-eight days, and that he was treated during that time by Dr. Schaffner, do you have an opinion, Doctor, as to whether or not there is any causal connection between those injuries he received in 1944 and the condition you found Mr. Dice suffering from when you examined him in March of 1949?

Mr. Kelly: Objection.

Mr. Hatch: Q. Now, that can be answered yes or no if you have an opinion.

The Court: Well, I am going to leave that question. It is four o'clock. I am afraid the Doctor will have to come back sometime. You haven't had any cross examination yet.

Members of the jury,—I admonish you not to discuss this case outside the Courtroom with anyone or permit anyone to discuss this case with you in any way whatsoever. This case, (59) may become interesting but nevertheless you are to keep everything to yourselves until you get into your juryroom. Then you can discuss it all you care to. You are now excused until tomorrow morning at nine o'clock.

And thereupon Court adjourned until nine o'clock A. M., October 14th, A. D. 1949, at which time Court

having convened pursuant to adjournment, the trial of said case proceeded as follows:

(Dr. Terwilleger on the stand for further direct examination by Mr. Hatch.)

Mr. Kelly: Read the question.

And thereupon the reporter read the last question put to the witness, as shown on the previous page.

Mr. Kelly: Now, the question is objectionable in several respects, Your Honor. It doesn't describe the injury at all. It just says off for several periods of time.

The Court: I will sustain it.

Mr. Hatch: Q. All right. Doctor, now I will add some more to that question, then. It isn't satisfactory as to form. Assuming that Mr. Dice previous to May 30, 1944, had been enjoying good health, had never had any injury or trouble with his lower left abdomen or groin, that he had never experienced any arthritic pain nor traumatic neurosis or nervousness; that on that day he was acting as a fireman and was on board Locomotive Number 404 belonging to the defendant the AC&Y Railroad, which locomotive jumped the track, turned over on its right side, turned completely around headed the opposite direction; that as a result of turning over he (60) was thrown violently about the cab of that locomotive; that he sustained bruises and contusions all over his body, particularly in the back and in the region of his lower abdomen; that thereafter he was hospitalized in the City Hospital of Akron for several days; and that he remained home an additional period to total around fifteen days; that he went back to work and then shortly thereafter had to stay off of work for a couple of months, and after September, 1944 intermittently he stayed away

from work because of sickness and illness; while he was in the hospital he passed blood and that until September, 1948, he was unable to do any work after April, 1947 until September, 1948, he was unable to do any work, except then he got a job as a school policeman; that all during that time until around October of 1948 when Dr. Schaffner died, he was treated by Dr. Schaffner for these conditions in his groin and in his back; do you have an opinion, Doctor, as to whether or not the condition that you found in his lower abdomen and in his back and this nervousness,—do you have an opinion as to whether or not there is any causal connection between the condition that you found and the injuries he received in May, 1944?

Mr. Kelly: Objection.

The Court: Now what condition are you specifying that he found?

Mr. Hatch: The condition in the groin and the back and this nervousness, Your Honor, that he has testified to before.

Mr. Kelly: May I suggest this, Your Honor,—the Doctor (61) has not made any statement as to what—any condition he found in the back. The most that he has said is—

The Court: Subjectively the man said he had pain.

Mr. Kelly: The most he said is he found a mass in the lower left quadrant. That is the only objective finding he has made.

Mr. Hatch: Subjective finding.

Mr. Kelly: You are speaking about back condition?

The Court: Didn't say he had a back condition.

Mr. Kelly: No.

The Court: Simply said he complained of pain in the back. I don't think this question is even fair to your Doctor.

Mr. Hatch: Pardon?

The Court: I don't think this question is even fair to your Doctor. Well, you are asking whether he had an opinion.

Q. You may answer that yes or no.

Mr. Kelly: Exception.

A. Yes.

Mr. Hatch: Q. Will you give us your opinion, Doctor?

Mr. Kelly: Objection.

The Court: Q. Go ahead and answer if you can.

Mr. Kelly: Exception.

The Court: Q. If you can. A. I believe the injury.

The Court: Q. What injury? A. The injury sustained in the wreck is the cause of his present condition.

Mr. Kelly: Move the answer go out; the jury be instructed (62) to disregard it.

The Court: Q. What injuries did you have reference to that he sustained in the wreck? A. The injury to the lower left abdominal region.

The Court: Q. How do you know he sustained an injury to the left lower abdominal region?

Mr. Hatch: If Your Honor please, that is in the assumed question.

The Court: No, it isn't. That is just where you are wrong. The jury will disregard the answer.

Mr. Hatch: Well, now, if Your Honor please, that is. I want you to read.

The Court: The jury will disregard the answer.

Mr. Hatch: The plaintiff, Mr. Dice, testified when he was crawling out he got himself caught.

Mr. Kelly: Yes, that is all he said.

Mr. Hatch: And he hurt himself.

Mr. Kelly: No, he didn't say that.

The Court: I have already told the jury to disregard the answer.

Mr. Hatch: Save our exception.

Q. Now, Doctor, assuming that a fireman must stand up in a locomotive with his feet spread apart, that he must use a shovel of about a weight of five pounds, push that into a coal bin or tender, turn around and throw that coal into the fire, or maybe they do it this way, I am not sure (illustrating); but they at least have to turn their body or torso in throwing or spreading that coal into the fireplace, do you have an opinion as to whether or not Mr. Dice can now perform (63) those duties of a fireman?

Mr. Kelly: Objection.

The Court: I don't know whether there is anything expert in that at all; he answered those questions yesterday.

Mr. Kelly: That is right.

Mr. Hatch: I believe the Court sustained the objection?

Mr. Kelly: No, the court let it in.

The Court: No.

Mr. Hatch: Q. Doctor, you have never taken or had X-rays taken, have you? A. No.

Q. There is testimony that shortly after the collision that there were X-rays taken at City Hospital. I believe they will be available here later on. Assuming that those X-rays show an arthritic condition, now assuming further that Mr. Dice had never had any pain in his back, arthritic pain, is it possible, Doctor, do you have an opinion as to whether a trauma such as he received in this accident could activate a dormant condition of arthritis?

Mr. Kelly: Object to the form and competency of the question.

The Court: I will sustain it.

Mr. Hatch: Q. Are you familiar with arthritis in general? A. Yes, sir.

Q. Now, are there several stages of arthritis, is there a dormant stage and an active stage? A. Yes, sir.

Q. Now, is it possible that a dormant stage of arthritis could be activated or accelerated by some trauma?

(64) Mr. Kelly: Objection.

The Court: Sustained.

Mr. Hatch: Well, if the Court please, he is competent to testify as to that.

The Court: I think it is immaterial under the Petition anyway.

Mr. Hatch: I think it ~~is~~ covered, Your Honor, by internal injuries.

The Court: Well, that question is objectionable for another reason anyway.

Mr. Hatch: Well, I would like to argue that point; might as well get—I would like to argue that in the absence of the jury, Your Honor.

The Court: What point?

Mr. Hatch: As to whether or not he is permitted to answer that.

The Court: He is permitted to answer a proper question.

Mr. Hatch: Well, what is the objection to it, I would like to know?

Mr. Kelly: In the first place, Mr. Hatch, I will be glad to answer it for you,—you don't claim arthritis or any aggravation of arthritis in your complaint; in the second place your question is improper as to form.

Mr. Hatch: Well, if the Court feels it is not covered by the Petition, if later on it shows by all the evidence, I would like leave to amend.

The Court: I would like to talk to counsel here in (65) Chambers one minute.

(Court and counsel retired to the Court Chambers; later returning to the Court Room.)

The Court: Do you have any objection to putting the chart in?

Mr. Kelly: No, put it in subject to its competency.

The Court: All right. (Court looking at papers.)

The Court: It isn't competent in itself.

Mr. Kelly: No. It isn't competent under the state of the pleadings now.

The Court: I know it.

Mr. Kelly: I don't want to be captious about it.

The Court: It was in evidence the last time?

Mr. Kelly: If you are going to put it in, put the whole thing in.

Mr. Hatch: All right.

Mr. Kelly: I won't—I won't object. I want to help the Doctor; he is anxious to get away. He has another important engagement.

Mr. Hatch: He wants the whole thing in?

Mr. Kelly: Yes; if you are going to put any of it, put it all in.

The Court: I didn't know it was a hospital record.

Mr. Hatch: May I have the Doctor read that?

The Court: No. The Doctor don't need to read, the jury can read.

Mr. Hatch: All right.

Mr. Kelly: Read the question.

(66) Thereupon the Reporter read the last question asked by Mr. Hatch of the witness, as follows: "Q. Now, it is possible that a dormant stage of arthritis could be activated or accelerated by some trauma?"

The Court: I sustained objection to that.

Mr. Hatch: Q. Assuming, Doctor, that the hospital report shows that X-rays were taken on May 31, 1944, that showed osteo-arthritic changes of the cervical spine, and assuming further, Doctor, that Mr. Dice had never experienced any arthritic pains do you have an opinion, Doctor, as to whether or not the injuries he received in this wreck could have activated this arthritic condition?

Mr. Kelly: Object to the form and competency of the question.

The Court: Sustained.

Mr. Hatch: All right. That is all, Doctor.

#### CROSS EXAMINATION by Mr. Kelly.

Q. Just two or three questions, Doctor, please. Doctor, you did not know Mr. Dice before March 1, 1949, did you? A. No, sir.

Q. You have no personal knowledge of his state of health prior to that date? A. No, sir.

Q. Did you ever work as a fireman on any kind of a railroad locomotive? A. No, sir.

Q. Did you ever ride on any kind of a railroad locomotive? A. Yes, sir.

Q. When? A. I don't know.

Q. But you never worked on one? A. No.

(67) Q. You have no personal knowledge as to the duties of a fireman on any kind of a railroad locomotive, have you? A. Yes.

Q. Where did you obtain that knowledge or how did you obtain it? A. I saw them shoveling coal.

Q. Work the tender? A. And throwing off the ashes.

Q. When and where? A. On the Pennsylvania Railroad.

Q. Where? A. Westmore.

Q. When? A. 1900, 1901, 1902.

Q. Doctor, you know as a matter of fact, that there has been a great change in the development and use and types of railroad locomotives between that time and 1944, don't you? A. Yes.

Q. As a matter of fact, the Diesel locomotive has been developed since that time, since 1901? A. Yes.

Q. Automatic stokers have been developed since that time? A. Yes.

Q. So you have no personal knowledge of the type of work Mr. Dice was engaged in, have you? A. No, sir.

Mr. Kelly: That is all.—I move the testimony of the Doctor with respect to whether Mr. Dice is engaged—could do railroad work be stricken from the record and the jury instructed to disregard it.

The Court: Well, I think perhaps I will let that stand, what he said.

Mr. Kelly: Note an exception.

The Court: What it amounts to is whether he thought he was able to shovel coal at the present time.

(68) Mr. Hatch: Shall we put Mr. Dice back on, Your Honor?

The Court: Yes.

And thereupon, in order to further maintain the issues upon his part to be maintained, the plaintiff recalled as a witness himself, JOHN F. DICE, who, having been heretofore duly sworn, testified as follows:

FURTHER DIRECT EXAMINATION by Mr. Hatch.

Q. Now, before, I think I asked you whether Dr. Schaffner died in 1947, he died in the latter part of 1948, didn't he? A. Somewhere along in there.

Q. Last year, wasn't it? A. I think it was.

Q. Yesterday, John, you were telling the jury the dates that you were off work, and I believe we covered the entire period from May 30, 1944 until April 22, 1947. You testified that you were off work from April 13, 1947 to April 22. Now, will you look at your record and tell us how long you worked after April 22, 1947? A. 22nd? I worked the—

Q. Now, John, you will have to speak up. A. I worked the 22nd, 23rd and 24th of April, 1947, and on said morning of April 25th I laid off. I haven't worked any since on the railroad.

Q. Did you report off sick? A. Yes, sir, I did.

Q. Do you remember to whom you reported? A. If I ain't mistaken it was Mr. Burkhardt.

Q. Who is he? A. Well, he is general—well, he is overhead of the yard there.

Q. Yardmaster? A. Yes.

(69) Q. Or assistant? A. Yardmaster at night.

Q. Speak up. A. Yardmaster at night.

Q. You haven't worked since? A. No, sir.

Q. Will you tell the jury whether or not you were having any sensations at that time? A. Yes, sir. Very bad.

Q. Well, just tell the jury how you felt? A. Well, I couldn't even ride the Diesel. I would jog down to Goodyear there, they work the Diesel down, and I had such pains in my side and back that I couldn't ride the Diesel. It just would jog my nerves. So I come in. I worked the 29th, and I come in that morning and I told the engineer—

Mr. Kelly: Object.

Mr. Hatch: Not what you told— Q. Go ahead.

The Court: That is right.

A. That I had such awful pains that I was going to lay off, so I went up to the yard office and marked off and I haven't marked up yet.

Q. I believe thereafter you notified the main office that you were unable to work, did you not?

Mr. Kelly: Objection.

Mr. Hatch: Q. Someone at the main office? A. Yes, sir.

The Court: Q. Well, did you talk to anybody at the main office? A. Yes, sir.

Mr. Hatch: Q. Now—

The Court: Q. To whom did you talk? A. To Mr. Hochberg.

Mr. Hatch: Q. Who is Mr. Hochberg? A. Well, he is, the way I figure out, assistant to Mr. H. G. Watkins.

(70) Mr. Kelly: Move that the answer go out; not responsive. If he doesn't know, he is not permitted to guess.

Mr. Hatch: Q. Who is Mr. Watkins? A. Vice-president of the Company.

Q. And who is Mr. Hochberg?

Mr. Kelly: If he knows.

The Court: That is right. If you know who he is, you may tell. If you don't know, say so. Don't guess.

A. Well, he is Mr. Watkins' assistant.

Mr. Hatch: Q. You had had conversations with him before, hadn't you? A. Yes, sir.

Q. Back in 1944 about this? A. Yes, sir.

Q. Now, did they ask you, or Mr. Hochberg ask you to get a statement from your doctor?

Mr. Kelly: Objection.

The Court: He may know. The question is whether he had authority to do that.

Mr. Kelly: It is immaterial.

Mr. Hatch: Well, I will withdraw that.

Q. At that time, what sort of locomotives did the AC&Y have in May, 1944? What types of locomotives?

A. Had what they called a Class R, Class M, and a Class L.

The Court: Q. Class what? A. L.

Mr. Hatch: Q. Did they have a Class O? A. Yes, sir.

Q. Now, just tell the jury here how those locomotives are fired, which types?

Mr. Kelly: Your Honor. I don't see the competency of it. I will object.

(71) Mr. Hatch: You brought the question up, Mr. Kelly. You say some of them are automatic. You inferred they are all automatic.

The Court: He didn't say they were all automatic.

Mr. Hatch: I am trying to get this witness to tell the jury what types they had.

The Court: Q. What type of work—

Mr. Hatch: Q. What type did you work on? A. Worked on all of them.

Mr. Hatch: All right.

The Court: All right.

Mr. Hatch: Q. Now, go ahead. A. Well, all of them but Class R's. Class R is stoker, Class O and L is a shovel engine that you have got to shovel the coal in.

Mr. Kelly: Q. The other ones? A. Are automatic.

The Court: Q. What is 407? A. 404 is a stoker.

The Court: Q. The day you turned over, was a stoker? A. Yes.

The Court: Q. So you did work on a stoker, too? A. Yes, sir, worked on all of them.

Mr. Hatch: Q. You worked on all of them? A. Yes, sir.

Q. Those that were automatically stoked, you do that by turning valves, is that right? A. Yes, sir.

Q. That runs the coal in? A. Yes, sir.

Q. And the other types that you have to hand fire, is that correct? A. Yes, sir.

Q. Did you work on those? A. Yes, sir.

Q. Now, when you are on this—on active duty, did you (72) have any choice as to whether or not you are going on an automatically stoked— A. No, sir.

Q. You take the one that they assign you? A. Yes, sir.

Q. And you never know, is that correct? A. That is correct.

Q. Now, they only have one or two Diesels, do they not? A. Yes, sir.

Q. How many do they have? A. Well, I couldn't answer that, because they have got—

Q. At that time? A. They had two.

Q. They had two. Did you ever work on those? A. Yes, sir.

Q. Well, when you get your assignment for the day, do you know beforehand which one you are going to get?

A. No, sir, you do not.

Q. If they assign you a locomotive that is hand-fired, you have to take it, is that correct? A. Yes, sir; yes, sir.

Q. Now, were you under any doctor's care in April of 1947, the last time you worked?

Mr. Kelly: \*Objection.

The Court: He may answer.

A. Yes, sir.

Mr. Hatch: Q. Speak up, John. A. Yes, sir.

Q. And who? A. Schaffner. Dr. Schaffner.

Mr. Hatch: Is there any objection? (Showing paper to Mr. Kelly.)

Mr. Kelly: I don't see the competency of it, Mr. Hatch.

Mr. Hatch: I am going to ask.

(73) Mr. Kelly: Go right ahead.

Mr. Hatch: Q. Do you recall how much you were earning at the time of this accident? A. Do you mean for that run?

Q. For that run to Delphos and back that you never completed?

Mr. Kelly: Mr. Hatch, in order to save time, if you are interested in this, we have Mr. Dice's earnings for the year 1944 down until the last day he worked.

Mr. Hatch: You have the rates here, too.

Mr. Kelly: I am talking about his actual earnings. If you are interested, to save time.

The Court: Not the rates but what he—what he lost, then could be established what he had been earning.

Mr. Hatch: Let me see. Q. Where are you working now, John? A. School cop at Ellet.

Mr. Kelly: We have the breakdown and the recapitulation.

Mr. Hatch: Q. How much do you earn, John, now?

Mr. Kelly: Objection.

The Court: Sustained.

Mr. Hatch: I think that is competent, Your Honor.

Q. How many hours a day do you work?

Mr. Kelly: Objection.

The Court: Sustained.

Mr. Hatch: Q. Did you work any after April, 1947, until you got this job with the School? A. No, sir.

Mr. Kelly: Objection.

The Court: What is the last question?

And thereupon the reporter read the last question put (74) to the witness.

The Court: Sustained.

Mr. Hatch: Q. After April, was it the 25th, I believe, of 1947 you worked at your job as a fireman, have you worked since then, April, 1947? A. Now, I am just a school cop.

Q. Have you worked at your job as a fireman? A. No, sir.

The Court: Since when?

Mr. Hatch: April, 1947.

The Court: All right.

Mr. Hatch: Q. When did you next secure employment of any kind?

Mr. Kelly: Objection.

Mr. Hatch: Q. I say, when?

Mr. Kelly: That isn't the test, Your Honor.

The Court: Well, maybe he couldn't get a job.

Mr. Hatch: It certainly is. Did you sustain that?

Q. All right, John, you were under Dr. Schaffner's care, were you, until he died? A. Yes, sir.

Q. Will you tell this jury what you did between April, 1947 and September, 1948?

Mr. Kelly: Objection.

Q. —If anything, by way of gainful employment?

Mr. Kelly: Objection.

The Court: Come up here, both of you. (Talking with the Court.)

Mr. Hatch: Q. Now, since May, 1944, when you had this wreck did you work at any other place up until April of (75) 1947 except the AC&Y Railroad? A. No, sir.

Q. And you haven't worked with the AC&Y Railway since April, 1947, have you? A. No, sir.

Q. Where else have you worked since April, 1947? A. No place but just school cop.

Q. I can't hear you. A. No place but just school cop.

The Court: Q. Well, when did you begin to be a school cop? A. In September of 1948.

Mr. Hatch: Q. Now, how much—are you still working there? A. Yes, sir.

Q. That is, on school days, is that correct? A. Yes, sir; that is right.

Q. And you don't work in summer vacation periods? A. No, sir.

Q. Or on Saturday or on Sunday, do you? A. No, sir.

Q. And you get paid for the days you work, do you not? A. Yes, sir.

Q. How many hours a day do you work as a school cop? A. Three and one-half.

Q. Well, what are those hours? A. From eight until nine in the morning; from eleven-thirty until one at noon and from three to four.

Q. And what is your rate of pay for that? A. Get Twenty Dollars a week, five days.

Q. What did you say? A. For five days.

Q. Well, if you are off do you get paid? A. No, sir. Get deducted.

Q. Did you try to get any employment between April, 1947 and September, 1948?

Mr. Kelly: Objection.

Mr. Hatch: I will withdraw it.

Q. What was your physical condition with reference to working during that period, April, 1947 to September, 1948? A. It was not good.

Q. What do you mean by that, John? A. Well, I—I had such pain all the time that I didn't care about looking for work. All I did was laid around the house.

Q. Did you do any work around the house? A. No, sir.

Q. Prior to the wreck had you done work around the house? A. Oh, yes.

Q. Well, for instance? A. Well, I done a lot of work. I built—I had built that place and I was doing some remodeling work to it, and it is just left the way I left it.

Q. When, what do you mean, when you left it? A. Along in Forty—just before the wreck, along in '44.

Q. And you were under Dr. Schaffner's care until October, 1948, is that right, until he died? A. Until he died.

The Court: We had that about four times now.

Mr. Hatch: Q. Do you have available your earnings for the year 1944?

Mr. Kelly: They are right there, Mr. Hatch. We have given to you.

Mr. Hatch: I am asking Mr. Dice.

Mr. Kelly: Pardon.

(77) A. I have them but I haven't got them with me.

Mr. Hatch: Q. Do you have your wage slips? A. Somewhere around the house.

Q. Do you know whether or not there was an increase in the rates of pay after 1944? A. Yes, sir, there was.

Q. Do you remember how many between '44, '45, '46, '47, I mean in those years? A. No, I couldn't call it right now just what it was.

Q. Do you remember what you made on that run to Delphos that day? A. As near as I can recollect, it was about \$14.82.

The Court: Q. You mean, there and back? A. One way.

Mr. Kelly: One way.

Mr. Hatch: Q. Now, you had different rates, did you not? A. Yes, sir.

Q. Was that a local or a through freight? A. I don't recollect what it was, whether it was a through freight or whether it was a local.

Q. There is a different rate for those, is there not? A. Yes, sir.

Q. There is a different rate, then, for the yard work? A. Yes, sir.

Q. Do you know what that run paid in April of 1947? A. No, sir, I do not.

Q. Was it the same or was it a higher rate? A. Well, I couldn't say.

Q. All right. John, according to your seniority, you were entitled to take an examination, were you not, under the contract with the Company for an engine-man or engineer? (78) A. Yes, sir.

Q. And had you been granted permission to take that Exam? A. Yes, sir.

Q. What does that examination consist of? A. Well, the first examination is—

Q. Speak up. A. —is oral and the machinery is locomotive—

Q. What? A. Your first examination is of the locomotive.

Q. An oral examination? A. Yes, sir.

Q. What do they call it, mechanical? A. Well, that is, I think they would call it mechanical.

Q. Then there is a written examination, is that right? A. Yes, sir.

Q. Do you take it all at once, or is it given separate times? A. Given separate times.

Q. Did you take your oral examination? A. I did.

Q. And did you pass it? A. I did.

Q. Do you know what grade you received? A. No, sir. I do not, right offhand.

Q. Did someone of the Company advise you that you had passed it? A. Yes, sir.

Q. Who? A. Well, you get a paper with some of the officials' signature on it.

Q. Well, what official was on that? A. H. B. Watkins was one, and Mr. Eistein was one and I think Superintendent F. F. Lynch (Lentz).

Q. Now, did you start to take the written examination? (79) A. Yes, sir.

Q. Where was that taken? A. Out in the yard office.

Q. And did you complete that? A. No, sir.

Q. Why not?

Mr. Kelly: Objection.

The Court: Why he didn't complete the examination?

Mr. Hatch: For engineman.

The Court: I don't see as that is any part of his lawsuit, your lawsuit any way.

Mr. Hatch: Well—

The Court: Not concerned.

Mr. Hatch: It is alleged in the Petition that if he had not been sick he would have passed his examination for engineman.

The Court: That is a pure conclusion. I will sustain that objection.

Mr. Hatch: Q. John, do you know about how much you paid Dr. Schaffner for medical treatment after May, 1944, personally for treatment to you? A. Well, in the neighborhood of \$150; might be a little more, little less; around that neighborhood there.

Q. All right. Do you know how many trips you made to Dr. Terwillegar? A. No, I do not.

Q. Do you know how much his bill is? A. Well, sir, he hadn't said yet.

Q. All right. You paid him for medicine, have you, in addition? A. Dr. Terwillegar?

Q. Yes. A. No, sir.

(80) Q. But you don't know what his bill is, do you? A. No, sir, I do not, sir.

Q. But you have been there a number of times, have you not? A. Yes, sir.

Q. I don't believe you got a bill, did you, from City Hospital? Did you get a bill from City Hospital? A. Yes, sir.

Q. For how much? A. Forty Dollars.

Q. For what? A. X-rays.

Q. But you didn't get a bill from Dr. Lemmon, did you? A. No, sir. The Company,—he is the Company Doctor.

Q. I see. You may examine.

#### CROSS EXAMINATION by Mr. Kelly.

Q. Mr. Dice, when and where were you born? A. Akron, Ohio, December 15th, 1893.

Q. When and where did you first start to do railroad work? A. The Baltimore & Ohio, 1917, as near as I can recall.

Q. What kind of work did you do? A. Fireman.

Q. Well, was that yard work or out on main line work? A. Both.

Q. How long did you work for the B&O? A. In the neighborhood of three and one-half years as far as I can recall.

Q. And when and where did you next work for a railroad company? A. I worked either for the Pennsylvania or the Erie.

Q. Where? A. Akron yards.

Q. What kind of work did you do? A. I was a fireman.

Q. Both yard and— A. Yard only.

Q. Yard work only? A. Yes, sir.

Q. How long did you work for either the Pennsylvania (81) or Erie? A. Well, right off hand, I would say a year, year and one-half.

Q. When next—When and where did you next work for a railroad company? A. Well, it was either, as I said, the Erie or the Pennsy, I couldn't just say which one was first.

Q. Well, whichever one it was, was one of the two?

A. Yes, sir.

Q. What kind of work did you do for either? A. Firing.

Q. How long did you work for the Erie? A. I worked for the Erie, oh, around the neighborhood of six months.

Q. What kind of work? What kind of road work did you do, what kind of work did you do as fireman, yard work? A. Yard work, yes, sir.

Q. When you worked for the Pennsylvania was your work yard work? A. Yard work and around the depot.

Q. That work consisted of firing steam locomotive? A. Yes.

Q. Solely steam locomotive? When and where next did you work for a railroad company? A. AC&Y.

Q. Starting in 1941? A. 1941.

Q. Now, when you worked for the B&O or the Pennsy or the Erie were you required to take any examination to qualify as a fireman? A. As a fireman?

Q. Yes. A. The only thing was—was you was examined and answered some questions.

Q. Was that an oral examination or written examination? A. It was written.

Q. And you answered the questions that were submitted (82) to you as a part of your examination, did you? A. As near as possible.

Q. That is, to the best of your ability? A. Yes, sir.

Q. In conjunction with that employment you were required to have certain physical examinations? A. Yes, sir.

Q. By each Company? A. Yes, sir.

Q. And I assume from what you have said that you passed those physical examinations? A. I did.

Q. In conjunction with those examinations your eyes were examined? A. Yes, sir.

Q. I assume that you passed those eye examinations? A. I did, sir.

Q. Now,—in '41, you applied for employment with the AC&Y Railroad Company, didn't you? A. Yes, sir.

Q. And in conjunction with your application for employment, you took a written examination, didn't you? A. I believe so.

Q. And in conjunction with that application for employment you submitted to a physical examination? A. Yes.

Q. You were examined by a Doctor? A. Yes.

Q. And you were passed physically and mentally, weren't you? A. Yes, sir.

Q. In conjunction with that application for employment, you also had your eyes examined? A. Yes, sir.

Q. You passed the test? A. Yes.

Q. And you applied for a job as a fireman? A. Yes, sir.

Q. And you were accepted for employment? A. Yes, sir.

Q. And you worked whenever there was work from June of (83) 1941 up until May 30th of 1944, didn't you? A. Yes, sir.

Q. And during that period of time you did nothing but fireman's work? A. That is all.

Q. You worked in the yards? A. Yes, sir.

Q. Now, tell the jury what yard work consisted of which you did? A. Well, I fired the engine, kept steam and water, keep them hot, keep steam and water in them, that the engineer can take cars—you pull out a string of cars out to one track and they will switch them cars to different tracks, and you have got to have plenty of steam so when the engineer wants to take a car why he can give that engine some speed to take a car back in to where he wants to go. That is what they call yard work.

Q. Now, in your yard work you used nothing but steam locomotives? A. And Diesels.

Q. You yourself? A. Diesels.

Q. Did you work on Diesels, also? A. Yes, sir.

Q. Then the steam locomotives which you worked on in your yard work were handfired locomotives? A. Yes.

Q. In other words, you didn't have automatic stokers on engines that were used by you on your yard work, is that right? A. No, sir.

Q. Now, in addition to your yardwork, you did what is known as main line work, or sometimes call it—

A. You mean, road work?

Q. Road work. I guess you would call the other road work? A. Yes, sir.

Q. Road work consisted of what as you did it? I am (84) talking about you yourself? A. Well, you—you fire the locomotive the same way. Sometimes you will have a stoker which feeds the coal in by some valves, and then sometimes you will get a handfired engine, too. It just

depends what engine is assigned to that run on that day. Q

Q. In other words, in your road work, you use locomotives which were both automatic, which had automatic stokers and some which were handfired? A. Yes, sir.

Q. And you did both? A. Yes, sir.

Q. Now, your road work consisted largely of operating as a working—as a fireman on a locomotive between Akron, Ohio and Delphos, Ohio, is that right? A. Yes.

Q. Now, which is the hardest work, yard work or road work from your standpoint. Put it that way? A. Well, from my standpoint, I would say the road work.

Q. Was the harder work? A. Yes.

Q. Was that true if you were using an engine with an automatic stoker? A. Yes, sir.

Q. Why? A. Well, if you had quite—quite a few stops, you couldn't use your stoker so well. You had to fire by hand, watch it close so the fire wouldn't go out in the firebox, because you can't carry a heavy fire. You have to keep it light, so it will burn good, get over the road.

Q. In other words, where you had to make a lot of stops, you couldn't rely entirely on the automatic stoker to keep up steam? A. That is right.

Q. As an auxiliary to that, you had to do some hand work? A. Yes.

(85) Q. Your rate of pay for road work was higher than yard work, wasn't it? A. It was.

Q. Now, directing your attention to May 29th or May 30th, 1944, you left Akron with the train crew to go to Delphos, Ohio, didn't you? A. Yes, sir.

Q. You were the fireman on that crew? A. Yes.

Q. I believe you said your conductor was Mr. Moore, your engineer Mr. Gable? A. Conductor, Mr. Moore, Engineer, Mr. Gable.

Q. Engineer Mr. Gable, and you had Engine 404?

A. Yes.

Q. That was a steam locomotive? A. Yes, sir.

Q. Equipped with an automatic stoker? A. Yes.

Q. You left Akron about what time? A. Sometime in the neighborhood of around two, two-thirty.

Q. A. M.? In the morning? A. In the morning.

Q. I believe you said yesterday you were on the extra board? A. I was.

Q. Tell the court and jury what that means? A. Well, an extra board means that you can't hold a regular run, that you are assigned to. In other words, the runs—a man older than you why he can bump you off of that run and hold it because he has more seniority; so I didn't have enough seniority to hold a regular job. So, in other words, they run the board first in first out, as on an extra board. And they have and if one man lays off this morning, off of a run, they will call the first extra man and put him on that run, and that runs the next man up. It just rotates. So I couldn't hold no run, and I was on what you call the extra board.

(86) Q. As a matter of fact, you were low down on the seniority list? A. Yes.

Q. —Among the firemen working for this Company at that time, weren't you? A. Yes.

Q. Now, at all times while you were employed by the Company you were a member of which Union, Mr. Dice? A. The Brotherhood of Firemen and Engineers Locomotives.

Q. In other words, while you worked for the AC&Y you were a member of a Labor Union of the Brotherhood of Locomotive Firemen and Enginemen, weren't you?

A. Yes.

Q. Still have a membership in that Union. A. Yes, sir.

Q. And the right to work, and the time of work and the place of work was governed by the Union rules and regulations, is that right, Mr. Dice? A. Yes.

Q. Now, on this particular day, you arrived out at Rushmore about 10:08 A. M.? A. Yes, sir.

Q. How far would you say Rushmore was from Akron along the track approximately? Just your best judgment? A. Well, about one hundred sixty-two mile.

Q. And how far was Rushmore from Delphos? A. Between four or five miles.

Q. What time was your train due at Rushmore that morning, do you know? A. No, sir, I do not.

Q. What time was it due at Delphos? A. I can't tell you that. Whenever we got there.

Q. Pardon? A. Whenever we got there.

Q. Was this a regular run? A. Yes, sir.

Q. Not an extra? A. No, sir.

(87) Q. It operated on schedule, didn't it? A. Yes, sir, it did.

Q. Of course, the schedule time, time of completing the run varied with the amount of switch operations you had to do between Akron and Delphos? A. Yes, sir.

Q. If I understand what you said yesterday, you were seated in the cab on the left side of the locomotive? A. Yes, sir.

Q. When was the last time that you made a stop before this accident occurred? A. I do not remember.

Q. Do you remember stopping at Columbus Grove?

A. No, sir, I do not.

Q. You don't remember where you stopped? A. No.

Q. All right. The weather was clear? A. A very nice morning.

Q. The rail was dry? A. Yes, sir.

Q. Visibility was good? A. Yes, sir.

The Court: Q. Are you answering those questions?

Mr. Kelly: Yes, sir. Q. Now, you say yesterday that you were sitting in the cab on the lefthand side, looking out, counting the ties, is that what you said? A. Yes, sir.

Q. Was that your job, to count the ties? A. No, sir.

Q. How long had you been counting the ties? A. Oh, not long.

Q. How long in point of time or in point of distance? A. Oh, just long enough to find out how many ties it was until the main rod went down until it came up and went down again.

Q. How fast was your engine moving at that time (88) while you were counting ties? A. Oh, I would say we were traveling along thirty, thirty-five miles.

Q. Do you want to tell this jury that you could count ties by watching that main rod making complete circle of revolution? A. Yes, sir.

Q. I see.

The Court: I think we had better recess. It is ten-thirty.

Members of the jury, with the usual admonitions, we will now have a short recess.

(Recess.)

Mr. Kelly: Q. Now, you also say, Mr. Dice, in addition to watching ties, counting the ties, that you noticed the switch stand? A. Yes, sir.

Q. And what kind of a switch stand was there there at this particular track? A. A tall one.

Q. A tall one? You just speak to the ladies and gentlemen over there. And it had the green flag on it. That don't call it a green flag? A. Green light.

Q. Which indicated the switch was closed? A. Yes, sir.

Q. So that your train could move westerly on the main track? A. Yes, sir.

Q. How far were you from that switch stand when you first noticed that switch stand? A. Oh, I was quite a ways back.

Q. Well, up until that time had you started to count ties? A. Well, I seen the switch stand first, because you can see it quite a ways ahead.

(89) Q. I don't know whether I asked you this or not, I want to be sure of it,—what did you estimate your speed to be at that time? A. I would say around thirty; thirty-five.

Q. And your steam was up? A. Yes, sir.

Q. And as far as you knew your engine was operating properly? A. Yes.

Q. And you were just standing there looking out ahead, counting the ties? A. Yes.

Q. I see. And while you were doing that, you say that you saw the pony trucks or as you call them, "the little trucks," turn at the switch? A. Yes, sir.

Q. What do you mean by that, Mr. Dice? Explain that, will you please? A. Well, looking out you can see that the little trucks had made a turn into the switch.

Q. And by that do you mean to say that the pony trucks or the little trucks—the right term is pony trucks, isn't it? A. Engine trucks.

Q. Engine trucks.—left the rails of the main track and got on to the rails or switch track. Is that what you want us to understand? A. Yes, sir.

Q. Is that the way to describe it? A. Yes, sir.

Q. You saw all that? A. I did, sir.

Q. Have you seen or do you have any photographs of the left side of Engine 404? A. No, sir, not here.

Q. Well, the left side of the engine is approximately the same as the right side, isn't it, in its structure? A. Yes, sir.

Q. Now, I direct your attention to Plaintiff's Exhibit 1. Now, the pony trucks or the little trucks that you speak of (90) are these wheels? A. Yes.

Q. Right at the front end of the locomotive? A. End of the locomotive.

Q. How many wheels are there there? A. Two.

Q. On each side? A. One on each side.

Q. One on each side. And those wheels are connected by an axle, aren't they? A. Well, I would say more like a—yes, on an axle than like a wishbone.

Q. Yes. But they are connected like a wagon axle, is that right? A. Yes, sir.

Q. And there is no power attached to those wheels?

A. No, sir.

Q. And I believe you said awhile ago, they acted as a guide, is that right? A. Yes, sir.

Q. Now, the left side of this engine had a running board on it, such as shown in this picture, didn't it? A. Yes, sir.

Q. It also had a cylinder or steel shaft there? A. Yes.

Q. Just like shown in that picture? A. Yes, sir.

Q. Now, Mr. Dice, do you say to this court and this jury that as you sat there in the cab of that engine, you could see the pony truck, those pony wheels leave the main rails and go in on the switch rails? A. You could see her dodge in.

Q. You could see that? A. Yes, sir.

Q. From where you sat? A. Yes, sir.

Q. Now, wasn't that running board right out in front of you obstructing your view? A. It was. It don't move. It was right out in front.

Q. Didn't that steel shaft obstruct your view? A. Not (91) of the engine turning, no, sir.

Q. How much did it turn? A. It turned that you could see the front end.

Q. I see. How tall are you? A. I don't know. I never measured.

Q. What do you estimate your height to be? A. Oh, about five foot five.

Q. Were you looking out the side of the cab or front? A. I was looking out the side, leaning out, looking out the side of the cab.

Q. How much were you leaning out, would you say, Mr. Dice? A. Oh, I don't know. I was leaning out quite a ways.

Q. Why were you leaning out quite a ways right at that time and right at that place? A. Well, I couldn't say why.

Q. Ordinarily you don't ride an engine that way, do you? A. No, without you look for something, then you look—

Q.. What were you looking for? A. I don't know. It is too long ago.

Q. I see. Well, anyway, you want us to believe that you saw those trucks, that one wheel—there is only one, wasn't there? A. One wheel on that side.

Q. That is the only one you could see? A. Yes.

Q. You want us to believe that you saw that wheel leave the main rail of that main track and go in on the south rail of that side track? A. You can't tell how far she went in.

Q. Now, do you want us to believe that store? A. I seen the engine turn in to the switch, yes, sir.

Q. You didn't see the engine, you said you saw the wheel. A. Yes, the front—

(92) Q. That is what you are trying to tell us? A. Yes.

Q. That you saw this single wheel leave the south rail of the main track and turn in to—on the south rail of that switch track? A. Yes, sir, the beet track.

Q. That is right. Then the next thing you noticed was that the engine went to the right, is that right? A. Turned over.

Q. On the—Went to the right, turned over and slued around and was heading back east? A. Yes, sir.

Q. Is that right? A. Yes, sir, yes, sir.

Q. Now, Plaintiff's Exhibit 2 shows the engine on its right side on the south side of the track, doesn't it? A. Yes, sir.

Q. That is the position in which it was in when it came to a rest? A. Yes.

Q. —or standstill after this derailment? A. Yes, sir.

Q. Well, now, when you saw this wheel which you say went on to the switch track did you make any outcry or do anything? A. No, I had no chance.

Q. And why? A. Because it was done, the snap of your finger.

Q. In other words, everything happened there just like that, didn't it? A. Yes, sir.

Q. The first thing you knew that engine was over on its side and you were in the cab? A. Yes, sir.

Q. It all happened in less time than it takes time to tell it right here, didn't it? A. Yes, sir.

Q. You got out of that cab alone, didn't you? A. Yes, (93) sir.

Q. You stayed around there where the engine was overturned for about how long? A. I didn't stay around at all.

Q. Weren't you there a few minutes? A. No, sir. I was scrambling to get out.

Q. After you got out of the cab? A. After I got out of the cab, crawled over on to the bank and came around on that side of the engine and I looked for my engineer. I couldn't see him. There was too much steam blowing out from the engine.

Q. How long did you remain around the engine before you left the place where the engine was? A. I didn't remain at all.

Q. I believe you said yesterday, you walked up to a road crossing? A. Yes, that is, up the track.

Q. How far away was that? A. Well, I couldn't just say how far it was.

Q. Just your judgment? A. Oh, I don't know. It is, I would say around perhaps a quarter of a mile, off-hand.

Q. You walked up—Pardon me. You walked up there alone and unassisted? A. I walked up with the engineer and conductor.

Q. I know. But no one helped you walk? A. No, sir; neither one.

Q. You walked without any assistance? A. Yes, sir.

Q. Then you got into an automobile? A. Yes, sir.

Q. You were driven into Delphos? A. Yes.

Q. You went to a doctor's office, where after some (94) delay you received First Aid, is that right? A. Yes, sir.

Q. Sir? A. Yes, sir.

Q. Then you left the doctor's office alone? A. Yes, sir.

Q. And went over to a bar or cafe and had something to drink? A. Yes, sir.

Q. What did you have to drink? A. Beer, I guess.

Q. How long were you there at the cafe? A. Not very long. I went to my room.

Q. Sir? A. Not very long. Until I went to my room.

Q. How much did you have to drink would you say? A. Oh, a couple of beers.

Q. Then you went over to your rooming house, you went to bed, you stayed and slept several hours? A. Yes, sir.

Q. Then you got up. Where did you go from your rooming house? A. I went down to the restaurant.

Q. Where? A. Down to the restaurant.

Q. Had you also something to eat? A. Yes, sir.

Q. Did you go over to the bar, cafe, at that time? A. After I had my supper.

Q. That is right. What did you drink over there?

A. Some more beer.

Q. And then later that night, an officer, a police officer of the railroad company brought you and Mr. Gable— A. Yes, sir—

Q. Back to Akron in his car? A. Yes, sir.

Q. In the officer's car? A. Yes, sir.

(95) Q. That was a distance of about how far, would you say? A. Well, one hundred sixty-seven mile, I guess.

Q. All right. And then the officer took you out to the East Akron Yard of the Company where your car was parked? A. No.

Q. Where did he take you? A. He took the engineer home first.

Q. But where did he take you? A. Then he brought me down to the railroad yards.

Q. That is out in East Akron? A. Out in East Akron.

Q. Your car was there? A. Yes, sir.

Q. You got in your car and you drove home alone? A. Yes, sir. He asked me whether I thought I could drive home—my car home alone.

Q. How far did you drive? A. Oh, I drove about two mile, up around Deadman's Curve.

Q. You went to bed? A. Yes, sir.

Q. And the next day, on the 30th of May, you received a telephone call from someone, didn't you? Dr. Lennon? A. Yes, sir.

Q. Asking you to go into the City Hospital for a check-up? A. Yes, sir.

Q. You went over to the City Hospital, drove over there, didn't you? Drove from your home over to City

Hospital? A. I don't remember if I drove over or the boy took me over.

Q. You got over about twelve-forty P. M.? A. Somewhere along there.

Q. You remained in the hospital until the 2nd day of June, 1944, until about two-thirty P. M., is that right? (96) A. As far as I can recollect.

Q. And during that stay at the hospital, X-rays of certain parts of your body were taken? A. Yes, sir.

Q. You were examined by—personally examined by Dr. Lemmon with your clothes off? A. Yes, sir.

Q. You tell this court and jury whether you observed any marks or bruises or cuts or lacerations on the lower left side of your body? A. My body was bruised all over.

Q. And were there any marks on the lower left side of your stomach or back? A. I can't recall.

Q. As a matter of fact, you didn't see a mark on your stomach, did you, when you were there at the hospital or before you went into the hospital? A. I can't recall that. I know I was black and blue.

Q. The only place you were black and blue was up on the chest, wasn't it? A. Oh, I had black and blue marks here on my sides, too.

Q. You didn't have any on your left side, though, did you? A. I had black or blue marks all over.

Q. Well, did you have any on your left abdomen? A. I would not say for sure.

Q. While you were there at the hospital your chest was taped up, is that right? A. I don't remember.

Q. All right. A. I can't remember that.

Q. Now, when did you first consult Dr. Schaffner? A. After I went back to work.

Q. All right. Do you know when, Mr. Dice? A. No, I do not know when.

(97) Q. Now, you went back to work on the 15th day of June, 1944, didn't you? A. As far as I can recall.

Q. And before going back to work, and particularly on the 13th of June, 1944, you were examined by Dr. Lemmon, were you not? A. As far as I know.

Q. Well, you know that to be a fact? A. Yes.

Q. And you know as a matter of fact that Dr. Lemmon O. K.'d you to go back to work, on the 13th of June, 1944, didn't he? A. He did.

Q. Well, then you went back to work on the 15th of June and you worked the rest of that month? A. Yes, sir.

Q. All right. And you also worked on July 1st, July 3rd and July 4th? You can refer to your books if you wish to check this. A. Yes, sir. I will take you for it.

Q. When you went back to work on June 15th, 1944, you did yard work with the exception of one day when you did road work, right? A. It must be.

Q. Well, don't your records show that, Mr. Dice? A. No, not on here.

Q. Didn't you have that in the green books of yours? A. Yes, sir.

Q. As far as you know what I am saying to you is correct? A. Yes.

Q. All right. Now, you only worked three days in July of 1944, right? A. Yes, sir.

Q. And you didn't do any work in the month of August, 1944? A. No, sir.

Q. Now, after you went to see Dr. Schaffner the first (98) time, he sent you in to the City Hospital for some X-rays, didn't he? A. Yes, sir.

Q. You went in and you had those X-rays taken?

A. Yes, sir.

Q. And in the month of July, and along about the 7th of July, 1944, you went down and were examined by a Doctor J. D. Smith, weren't you? A. Yes, sir, company doctor.

Q. When did you first see Dr. Walker?

The Court: Doctor who?

Mr. Kelly: E. M. Walker.

A. I can't tell you just when I seen him. I had to go to see him after Schaffner was away.

Q. All right. A. And he said that, "In case"—

Q. You—All right. A. "—you have to come up, why go over there to the drugstore, he says, where Dr. Walker is and he will take care of you. He takes care of my patients while I am away."

Q. How many times did you see Dr. J. D. Smith in either July or August of 1944, Mr. Dice, do you remember? A. No, I do not.

Q. You saw him on more than one occasion? A. It seems to me I did, once or twice.

Q. Now, isn't it a fact that on or about the 25th of August, 1944, Dr. Smith personally told you that you were ready to resume work? A. Not that I can recall.

Q. All right. Now, you went out to see Dr. Schaffner on or about the 31st of August, 1944, didn't you? A. That is right.

Q. I hand you what is identified as Defendant's Exhibit (99) 16, and ask you if that is not an original statement which you received from Dr. Schaffner on or about the 5th of September, 1944? A. Yes, sir, that is.

Q. Dr. Schaffner personally gave that statement to you personally at his office on that date? A. Yes, sir.

Q. And on that very date you took this statement down to the office of the AC&Y Railroad Company here in Akron, didn't you? A. Yes, sir. Main office.

Q. You then started, resumed work on September 6th, September 7th, 1944, didn't you? A. Yes, sir.

Q. And you worked practically every work day on which there was work available to you the rest of that year of 1944? A. That is right. All but vacation.

Q. That is right. You were entitled to a vacation and that vacation was granted to you? A. That is right.

Q. Now, the total amount of your pay which you received for the month of June, 1944, was \$176.49, was it not, Mr. Dice? Do you have your pay records? A. Not with me.

Q. I see. Is there any question but what the records of the Company are correct as to the amount it paid you?

Mr. Hatch: I object. He wouldn't know.

Mr. Kelly: If he knows now.

Mr. Hatch: He wouldn't know that.

A. How much—did you say?

Q. June of 1944, you were paid \$176.49. Do you dispute that, Mr. Dice?

Mr. Hatch: If he knows.

Mr. Kelly: Q. Well, if he knows. I am asking him.

A. I wouldn't know.

(100) Q. All right, Well, you worked a few days in July, you have indicated, three days? A. Yes, sir.

Q. You worked in September; you worked in October; you worked in November; and you worked in December, 1944, didn't you? A. Yes, sir.

Q. You worked every month in the year, 1945, didn't you?

Mr. Hatch: No.

A. No, sir.

Mr. Kelly: Q. Didn't you work every month in the year, 1945? A. No, sir.

Q. What month didn't you work in 1945? A. From February 2nd to February 23rd.

Q. But you worked at some time during the month of February? A. Yes, some time but not the full month.

Q. And you worked every month during the year 1946, didn't you? A. Yes, and I was off some.

Q. That is right. And you worked the first four months or at least a part of the first four months of 1947?

A. Yes, part of them.

Q. Mr. Dice, do you have here or do you have available at home the income slip blank or income slips which the Company gave you showing your earnings for the years 1944, 1945, 1946 and during the time that you worked in 1947? A. Well, now, I couldn't say if I have or not. Laying around, I presume, somewhere in some drawers there.

Q. You know as a matter of fact that the Company did give you a slip? A. They did.

(101) Q. Covering your total earnings for each respective year? A. They did to take to the—

Q. Well, did you make an Income Tax Return based upon the amount of earnings shown on each of those respective slips? A. I did.

Q. Do you have a copy of your Income Tax Return for the year 1944? A. I could not say.

Q. For— A. I could not say whether I brought it or not.

Q. Well, do you know whether it has been destroyed? A. I can't say.

Q. You made a copy of it, didn't you? A. There was a copy made.

Q. And the original, of course, was sent in to the Government? A. Yes, sir.

Q. Will you make an effort to see if you can locate your copy of your 1944 Income Tax Return and produce it here this afternoon, or are you going home for lunch?

A. No, I don't go home for lunch. I live out in Ellet.

Q. Will you make an effort to locate it, bring it here Monday morning if it can be found? A. If it can be found.

Q. Now, after you went back to work in 1944, you continued to work as a fireman? A. Yes, sir.

Q. And you did both yard work and road work, didn't you? A. Yes, sir.

Q. And you worked on steam locomotives which were handfired? A. Yes, sir.

Q. And you worked on steam locomotives which were (102) automatic stoker fired? A. Yes, sir.

Q. And you also did some work on diesels? A. Yes.

Q. Now, work on diesels, does not require any firing or handling of coal, or does it? A. No, sir.

Q. They are fired—I mean, you use a diesel fuel oil to generate your heat on a diesel locomotive? A. Yes.

Q. And at the end of 1945, you did not work as often, as frequent, as you did during 1944, and 1945 and the early part of 1945, did you? A. No.

Q. That was because the War had ended practically and work had begun to slack off, isn't that right? A. Yes, sir.

Q. You were still on the extra board in 1947, weren't you? A. Yes, sir, as far as—

Q. You were on the extra board in 1946? A. Yes, sir.

Q. And in 1945, is that right? A. As far as I can recollect.

Q. Well, that is the truth, isn't it? Now, the last day that you worked for this Company was April 24th?

A. Right. On a Friday.

Mr. Kelly: That is all, reserving the right to call the witness for further cross examination, Your Honor.

And thereupon, in order to further maintain the issues upon his part to be maintained, the plaintiff called as a witness one MRS. MARY DICE, who, being first duly sworn according to law, testified as follows:

(103)

DIRECT EXAMINATION by Mr. Hatch.

Q. Mrs. Dice, will you speak up so that we can hear you back here? Will you please state your name? A. Mary Dice.

Q. And where do you live, Mrs. Dice? A. 2854 Morrison Street.

Q. Akron? A. Akron, Ohio,—Ellet.

Q. You are the wife of John Dice? A. Yes.

Q. Plaintiff in this action? A. Yes, sir.

Q. And when were you married, Mrs. Dice? A. In 1916.

Q. To Mr. Dice, were you? A. Yes, sir.

Q. And you have lived with him, have you, since that time? A. Yes, sir. Thirty-three years.

Q. Do you recall May of 1944 that something happened to John? Do you recall that? A. Yes, sir.

Q. It was about the last of May, was it not? A. On Decoration Day morning.

Q. All right. Now, prior to that time will you tell this jury what John's general condition of health was?

A. He was a strong, healthy man, able to work anywhere, any time.

Q. Now, to your knowledge did he lose much time from work because of illness? A. No, sir.

Q. He worked, did he not, for the AC&Y? A. Yes, sir.

Q. He was hired in there as a fireman in 1941? A. Yes, sir.

Q. Now, from 1941 to May of 1944, to your knowledge did he lose much time because of illness? A. No, sir.

Q. What if anything prior to May of 1944 did John do around the house? A. Well, we built a little home, him and I (102a) together, built our three—or five room home, there, and done all the work between us. Since that time why he isn't able to carry a—

Q. Just a minute. I will get to that. What else did he do around the house? A. Everything that was necessary to help me to make it a comfortable—

Q. Did he assist you with your duties around the house? A. Yes, sir.

Q. In what respect? A. Well, on washday, he would help me carry the clothes basket from the cellar and put my clothes line up. Now it is a thing he can't do.

Q. Wait a minute. This is just before. What was his general condition of health,—I think I asked that—

The Court: You asked that.

Mr. Hatch: Q. Did John evidence any nervousness? A. Not up until he was injured?

Q. Now, wait a minute, before? A. No, sir.

Q. Well, how was his disposition generally? A. Very pleasant. Very pleasant, easy to get along with.

Q. Now, after he got hurt in May of 1944, do you remember him coming home that night? A. Yes, sir.

Q. Did you see him? A. Yes, sir.

Q. Will you just describe to the jury your observations of him? A. Well, he was just—his body was all black and blue and bruised, from his head to foot.

Q. What, if anything, did you do for him? A. Well, I put water bottles on him and rubbed him with alcohol and things. Gave him aspirin until he got ready to go to the hospital.

(103a) Q. I believe, that was next morning, was it not? A. Yes, sir.

Q. Then after he came home from the hospital,—he went and stayed at City Hospital, did he not? A. Yes, sir.

Q. After he returned from the hospital what, if anything, did you do for John? A. Well, I continued to put hot water bottles where his aches were and rubbed him and give him pain pills.

Q. Any particular place? A. Well, on his side mainly.

Q. I believe he stayed around the house there until around the 15th of June, did he not? A. Yes, sir.

Q. Then he went back to work? A. Yes, sir.

Q. He worked a short time, then he was off for several months, was he not? A. That is right.

The Court: Q. How many months? How many months? A. Well, I just don't remember. For a couple or two or three months, it seems.

Q. He was off until some time in September, was he not? A. Well, it seems that long.

The Court: Q. When did he quit work? A. I just don't remember the date.

Mr. Hatch: Q. He didn't work very long when he first went back, did he? A. No, sir.

The Court: Q. Well, how long did he work? A. A very short duration.

Mr. Hatch: Q. If you remember. A. I don't remember just offhand.

(104) Q. Now, then, he went back to work in September, 1944,—do you recall that? A. I remember him going back, yes.

Q. Then do you know whether or not after that, whether he was off any? A. He was off and on more than he was anything else.

Mr. Kelly: I move the answer go out, Your Honor. It doesn't mean anything.

The Court: Sustained. It may go out.

Mr. Hatch: Q. Well, he was off then? A. Yes.

Q. To your knowledge? A. Yes.

The Court: Apparently you don't have any records but the defendant does have records. Why don't you get together and accept the records and be done with it?

Mr. Hatch: Well, we—Plaintiff has records from which he testified as to those times when he was off. He has his time books. We will be glad to put those in the record.

The Court: He probably knows when he was off better than she does.

Mr. Hatch: That is right. Q. All you know is that he did spend some time off of work, is that right? A. That is right.

Q. Now, when he was, did you have an opportunity to observe his condition of health? A. Yes.

Q. Now, what was that? A. Very nervous, ailing and complaining.

Q. Did he complain of any particular— A. His side.

Q. Whereabouts? A. In his left side, complained.

The Court: Q. Whereabouts in his left side? A. Down (105) along the groin, or what they call it.

The Court: Q. It is not the abdomen, then, it was the groin? A. Right in the left—

Mr. Hatch: Q. Left side? A. Side. Lower part of the abdominal—

The Court: Q. Was it in the abdomen or groin? A. Right along in the side, what you would call it.

Mr. Hatch: The witness indicating the lower left.

Q. Do you recall in April, 1947, the last time John worked for the AC&Y do you recall that period? A. Yes, sir.

Q. In April? A. Yes, sir.

Q. What was John's general condition of health as you observed it? A. Very painful and complaining and nervous. Very nervous.

Q. Well, in what respect did he evidence nervousness? A. Well, this pain in the side upset him and got him so nervous and techy, and he couldn't sleep or nothing. Upset.

Q. What do you mean, techy? A. Well, couldn't sleep. He was restless when he slept, disturbed of his sleep.

Q. And what about his disposition? A. Very unreasonable to get along with, nervous, upset, irritable.

Q. Now, how about now? A. He is getting worse instead of better.

Mr. Kelly: Move the answer go out.

The Court: Sustained.

Mr. Kelly: —jury disregard it.

Mr. Hatch: Q. Well, what about his nervousness now? Does he evidence any nervousness now? A. Yes, sir.

(106) Q. Now, just in what respect? A. He is still ailing and complaining of his side.

Mr. Kelly: Move the answer go out.

The Court: It isn't really responsive.

Mr. Hatch: I know it, Your Honor. Q. Well, how does he demonstrate around the house or elsewhere his nervousness? Now, just what does he do that makes you think he is nervous?

The Court: Q. Indicates nervousness? A. Well, he is very restless. He is always taking pain pills; nerve pills, complained of ailing and hurting.

Mr. Hatch: Q. What does he do that indicates to you that he is nervous, his actions, his speech or anything that would— A. Unpleasantness and doesn't rest in bed at night. He is very restless in his sleep.

Q. Now, does he assist you about the house now? A. He doesn't assist me at all. He is complaining and ailing. Little things he could do, why he is hurting all the time, he can't do it.

Mr. Kelly: Move that all the answer after the word "all" be stricken from the record, the jury instructed to disregard it.

The Court: It may go out.

Mr. Hatch: Q. Do you know whether or not he has been going to a doctor? A. Yes, sir.

Q. And what doctor? A. Dr. Terwilleger.

Q. You have been there on occasions with him, have you? A. Yes, sir.

Q. Now, prior to going to Dr. Terwilleger do you know (107) whether or not he went to a doctor? A. Went to Dr. Schaffner.

Q. And do you know how long he went to Dr. Schaffner? A. Off and on since he was injured, until he died.

Q. Did you visit John in the hospital back there the last part of May or June of 1944? A. Yes, sir.

Q. Were you able to observe his condition? A. Yes. He was in pain and nervous.

Mr. Kelly: Move that that part of the answer, "He was in pain" be stricken from the record; the jury instructed to disregard it.

Mr. Hatch: You may examine.

The Court: It may go out.

Mr. Hatch: You may examine, Mr. Kelly.

Mr. Kelly: No cross examination.

Mr. Hatch: Thank you, Mrs. Dice.

Mr. Hatch: If Your Honor please, I would like to introduce our exhibits in evidence, 1 to 5.

Mr. Kelly: No objection to any of them, Your Honor.

The Court: All right. They may go in.

(Which said exhibits, marked Plaintiff's Exhibits 1 to 5, are hereto attached and made a part of this Bill of Exceptions.)

Mr. Kelly: Has the hospital record been identified?

The Court: Well, it may be received, too. It will be received in evidence.

Mr. Hatch: I would like to pass these around, let the jury see these at this time.

The Court: Are you going to rest now?

(108) Mr. Hatch: I think so.

The Court: Do you think they have to see them now?

Mr. Hatch: Not necessarily, if you don't want them to see them.

The Court: I have no objection. If you are going to rest, I would like to adjourn.

Mr. Hatch: The plaintiff rests with the introduction—

The Court: All right.

Mr. Hatch: —of these exhibits.

Mr. Kelly: I would like to present a matter to Your Honor. It is almost adjournment time.

The Court: Let them look at those exhibits this afternoon. We can do something else.

Mr. Hatch: All right.

And thereupon the Court gave the usual admonition to the jury and excused them from the Courtroom until one-fifteen o'clock P.M. on said day.

Mr. Kelly: At the conclusion of plaintiff's evidence, defendant moves that all the evidence be withdrawn from the consideration of the jury and the jury instructed to return a verdict for and on behalf of defendant.

And thereupon counsel for defendant and counsel for plaintiff argued said motion before the Court.

The Court: Well, I am going to weigh this until after lunch.

And thereupon Court adjourned until one-fifteen o'clock on said day, at which time Court having convened pursuant to adjournment, the trial of said case proceeded as follows:

(109) P.M. Session, October 14th, 1950.

(Court and counsel in the Court chambers.)

Mr. Hatch: The plaintiff moves that in the furtherance of justice that the plaintiff be permitted to reopen his case to present evidence surrounding the execution of the purported release set up by the defendant in his answer.

Mr. Kelly: To all of which the defendant objects.

Mr. Hatch: The reason being that the plaintiff attempted so to do and the Court ruled that the plaintiff should not anticipate the defendant and did not permit further questioning on that line at that time.

The Court: Well, the Court finds that that might have misled counsel for the plaintiff, and since this motion has been made before the Court has ruled on motion to direct a verdict, the motion will be sustained, and the plaintiff will be permitted to reopen his case at this time; put on further testimony.

Mr. Kelly: Defendant excepts.

The Court: Call the jury.

And thereupon Court and counsel returned to the Courtroom and the jury were recalled.

And thereupon, in order to further maintain the issues upon his part to be maintained, the plaintiff recalled as a witness himself, Mr. JOHN F. DICE, who, having been heretofore duly sworn, testified as follows:

RE-DIRECT EXAMINATION by Mr. Hatch.

Mr. Hatch: Q. John, I will hand you what has been (110) marked for identification as Exhibit number 6,

and ask you if your signature appears on there? A. Yes, sir, it does.

Q. How many times? A. Three.

Q. Where did you put your signature to this exhibit?

A. Down in the AC&Y main building.

Q. Where is that? A. Down on the corner of Main and Exchange.

Q. In Akron? A. Yes, sir.

Q. Who, if anybody was there at the time you signed it? A. Mr. Hochberg.

Q. And he is the gentleman sitting back here, is he? A. Yes, sir.

Q. Now, when you had to go to the Main Office, who did you have to report to?

Mr. Kelly: Object to the form of the question.

The Court: What are you talking about generally?

Mr. Hatch: All right.

Q. Calling your attention, John, to September, 1944, when you reported back to work, who did you have to see before you could go back to work?

Mr. Kelly: Object to the form of the question. It carries an implication.

The Court: Yes. Q. Who did you see?

Mr. Kelly: Yes.

Mr. Hatch: Q. Who did you see?

The Court: Q. Who did you see? A. Mr. Hochberg.

Mr. Hatch: Q. Speak up. A. Mr. Hochberg.

Q. This way, so the jury can hear. Now, as I understood (111) you before, you say he is assistant to Mr. Watkins? A. Yes, sir.

Q. Assistant to Mr. Watkins? A. Yes, sir.

Q. That is better. I am going to go back here, then you can talk to me back here and all the jurors can hear you. Now, did you take something in, a paper to him from the Doctor or someone? A. Yes, sir.

Q. And did you say something to him or did he say something to you? A. Yes, sir.

Q. Will you please tell the court and jury what you said?

Mr. Kelly: Object.

Mr. Hatch: Q. —and what he said.

Mr. Kelly: Objection.

The Court: I don't think—I am afraid of that question. I will sustain that. You ought to be able to get it some other way, what you are trying to get, as I see it.

Mr. Hatch: Q. Well, did anybody ask you to sign this paper?

Mr. Kelly: Objection.

Mr. Hatch: Q. Well, who if anyone in connection with the AC&Y— A. Mr. Hochberg.

Mr. Kelly: Objection.

The Court: Wait. He hadn't finished his question, had you?

Mr. Hatch: Q. Who, if anybody connected with the AC&Y asked you to sign this paper?

Mr. Kelly: Objection.

The Court: You assume something all the time.

(112) Mr. Hatch: No, I am not.

Q. All right. Who is Mr. Watkins?

Mr. Kelly: Objection. He so testified this morning.

The Court: He says Vice-President. That isn't what we are talking about.

Mr. Hatch: Did the Court rule on that?

The Court: He testified who Mr. Watkins was. He said he was Vice-President.

Mr. Hatch: Q. Well, he testified also,—Well, is he Vice-President in Charge of Operations? A. Yes, sir.

Q. I believe you testified that Mr. Hochberg—do you know his initials?

The Court: Whose initials?

Mr. Hatch: Hochberg.

A. A. L., I think, I am not sure.

Q. Do you know his first name? A. We most generally call him Al.

Q. Al? A. Yes, sir.

The Court: It will probably show on the exhibit.

Mr. Kelly: It is right on the instrument.

The Court: If you will look on the instrument, it will probably show.

Mr. Hatch: Q. A. W. Hochberg; is that correct? A. I don't know what middle initial.

Q. You call him Adam? A. I call him Al.

Q. Had you talked to him before that date, before September, 1944? A. I talked to him different times.

Q. I can't hear you? A. Yes, sir.

(113) Q. How many times? A. Well, I can't just call how many times.

Q. Was it twice or a number of times? A. I talked to him a number of times.

Q. And you talked to him the day in September when you signed this paper? A. Yes, sir.

Q. Now, did he ask you to sign this paper?

Mr. Kelly: Objection.

The Court: What is your objection?

Mr. Kelly: Your Honor, it is my position that since he has admitted he signed the paper that that is

as far as he can go. I expect to attempt to maintain that position throughout this lawsuit, as I have already attempted when it started in issue.

The Court: Read the question again.

And thereupon the reporter read the last question.

The Court: Q. You may answer.

Mr. Kelly: Exception.

The Court: Q. You may answer. A. What was the question?

And thereupon the reporter reread the last question to the witness.

A. Yes, sir.

The Court: Q. Now, the real thing is, what did you say to him?

Mr. Hatch: That is what I am getting at. Q. All right. You were at Mr. Hochberg's desk, were you not?

A. Yes, sir.

Q. And just you and he were at his desk, is that true? (114) A. Yes, sir.

Q. Now, what if anything, did you say or what, if anything, did Mr. Hochberg say?

Mr. Kelly: Now, I object.

Mr. Hatch: Q. About this paper?

Mr. Kelly: We might as well thresh this out, Your Honor, if we are going into it.

The Court: Well, if we are going into it at all, we have to get what Mr. Hochberg said.

Mr. Kelly: All right.

Mr. Hatch: Certainly. Why, yes.

The Court: Not what he said, but what Mr. Hochberg said.

Mr. Hatch: Q. All right. What did Mr. Hochberg say to you?

Mr. Kelly: Objection.

The Court: You may answer.

Mr. Kelly: Exception.

A. He said that I would have to sign that piece of paper before I could go back to work, and he—he pushed the paper up to me to sign it, and before I signed the paper I asked him about—how about if I get reaction in my side again. He said, “We will just re-open it.” So I went to—

Mr. Hatch: Q. Wait a minute. You had signed something before that, had you not, back in June? A. Yes, sir.

Q. And did he say anything about that?

Mr. Kelly: Objection.

The Court: Nothing plead about that.

(115) Mr. Hatch: Q. You said, “We will” do what, reopen it?

Mr. Kelly: Objection.

Mr. Hatch: Q. Now, give me all of his conversation with you, John.

Mr. Kelly: Objection.

The Court: He may answer.

Mr. Kelly: Exception.

A: What was that question you asked?

Mr. Hatch: Q. Tell this jury everything Mr. Hochberg said to you when you were signing this or just before or after you signed it.

Mr. Kelly: Objection.

Mr. Hatch: Q. At that time.

The Court: Q. You may answer.

Mr. Kelly: Exception.

A. I took the piece of paper down to him from the Doctor that I was OK'd to go to work and he said, "We will figure up your time, what you have coming up to date, and he figured up the time. I believe it was in the neighborhood of \$139. I said to Mr. Hochberg, "How about my clothes and stuff that I had lost?"

Mr. Hatch: Q. Now, John.

Mr. Kelly: No.

Mr. Hatch: Q. This is in September.

Mr. Kelly: I move the answer go out, the jury be instructed to disregard.

Mr. Hatch: Q. When you got \$475,—September.

A. Oh.

Mr. Kelly: Wait a minute. Now, there is a motion in front of Your Honor.

The Court: Apparently he is talking about an entirely (116) different thing from what the question was,—Members of the jury, so you will disregard those statements.

Mr. Hatch: Q. Tell what happened when you got the \$475.

Mr. Kelly: Objection.

Mr. Hatch: Q. In September.

The Court: Q. What was said just prior to the time you got it, about what you were signing, if anything.

A. Why, he just—

The Court: Q. What did he say that you were signing? A. Why, he said,—he just pushed the paper up to me, said, "Here, you will have to sign this paper before you can go back to work."

The Court: Q. That is all he said?

Mr. Hatch: No.

The Court: Q. Go ahead. A. And so I picked up the paper to look at the paper, and he said, "Well, it is just a paper to show," he said, "that you sign before you can go back to work, so just sign it here and here." So I signed the paper at three places and after I signed the paper then he give me a check for the amount that was due to me up to date for the loss.

The Court: Q. Now, wait a minute. Now, you don't mean he gave the amount due to you, you mean he gave \$470 and some odd cents? A. \$475.

Mr. Kelly: Now, if Your Honor please, I want to make my record. Now, I move that all that part of the answer after "he gave me a check" be stricken from the record; the jury disregard it.

The Court: That can go out where,—the language, "He gave (116a) me a check" may stand.

Mr. Kelly: Now, I move the remainder of the answer in response to the question submitted by Your Honor—

The Court: Well, it wasn't all responsive. Read it.

(117) Thereupon the Reporter read the answer of the witness to next to the last question of the Court.

The Court: All out after "a check." I will let it all stand.

Mr. Kelly: Exception.

The Court: All but that amount due.

Mr. Hatch: Now, when you went in, John, did you hand Mr. Hochberg a paper from a Doctor? A. Yes, sir.

Q. And what did you say to Mr. Hochberg?

Mr. Kelly: Objection.

The Court: Sustained.

Mr. Hatch: I think this is important, Your Honor, to get this whole conversation in there to show a course

of conduct and also show that—what this amount was and what it was represented to be, etc. I think we have to get the whole conversation in while he was there.

The Court: Q. Where is the paper?

Mr. Kelly: I have it.

The Court: Use it.

Mr. Kelly: It has been identified. Mrs. Clayton has it, Defendant's Exhibit 16, if I remember right. He has already admitted he had it, took it in on September 5, 1944.

Mr. Hatch: Q. I hand you Exhibit 16, which you have testified was given to you by Dr. Schaffner, is that correct? A. Yes, sir.

Q. Addressed to Mr. H. G. Watkins? A. Yes, sir.

Q. And that is the paper you took in? A. Yes, sir.

Q. That day? A. Yes, sir.

(118) Mr. Hatch: Q. Now, John, over there they can't hear you when you talk to me. Speak up. A. Yes, sir.

Q. You handed this to whom? A. Mr. Hochberg.

Q. What did you say to Mr. Hochberg?

Mr. Kelly: Objection.

Mr. Hatch: Q. —when you handed him that paper.

Mr. Kelly: Objection.

The Court: Let's see it once. (Handing paper to the Court) I don't think what he says is of any consequence here.

Mr. Hatch: I think the whole conversation there is important, Your Honor.

The Court: Q. I suppose you told him this was from your Doctor, didn't you? A. Yes, sir.

The Court: Q. You handed it to him? A. Yes, sir.

Mr. Hatch: Q. And "I am ready to go back to work"? A. Yes, sir.

The Court: All right. I don't know as that adds anything to it.

Mr. Hatch: Q. All right. When you told him that what did he say to you?

Mr. Kelly: Objection.

The Court: I think he has testified to what he said.

Mr. Hatch: No. No he hasn't given it all.

Mr. Kelly: Your Honor, may I inquire, are we getting into a situation where they are trying to vary the terms of a written instrument?

The Court: Pretty close.

Mr. Kelly: All right. It is needless to suggest, Your (119) Honor, that that cannot be done under the law of the State of Ohio.

The Court: Keep to the allegations of your Petition, your Reply.

Mr. Hatch: That is what I am attempting to do, Your Honor, but apparently the defendant doesn't want to have the story come out.

Mr. Kelly: Now, I object to that statement and ask counsel be admonished and the jury instructed to disregard it. I am endeavoring—at least I am, to try this case under proper objection under rule. I ask counsel be admonished and the statement withdrawn from the record.

Mr. Hatch: It may go out. I am sorry.

The Court: All right. We are not concerned with anything that might be said here that would directly alter the terms of the written instrument, because you cannot alter the terms of a written instrument by parole evidence.

Mr. Hatch: That is true but we are not endeavoring to do that.

The Court: Now, the Courts have said very definitely what you could prove. Now, get down to that that you expect to prove here and not just go out into anything, because it would be tantamount to destroying a written instrument.

Mr. Hatch: I know, Your Honor, but in order to do that it is necessary that the whole conversation not just the part the defendant—

The Court: No. It isn't necessary at all.

Mr. Hatch: The whole conversation.

The Court: It is not necessary at all.

(120) Mr. Hatch: Well, it is from our standpoint.

The Court: No. No, it isn't.

Mr. Hatch: Everything that was said.

The Court: It isn't necessary to say everything that was said.

Mr. Hatch: Well, I suppose when you say "How-do-you-do," that wouldn't be necessary, no.

The Court: More than that. And—(Court showing book to attorney).

Mr. Hatch: Did Mr. Hochberg say anything to you about whether or not this release was for your loss of time only?

Mr. Kelly: Object. He has answered it.

Mr. Hatch: No, he hasn't answered that.

Mr. Kelly: Well, read back.

The Court: I don't know whether he said that specifically or not.

Mr. Hatch: No.

The Court: Q. You may answer that question yes or no. A. Yes, sir.

Mr. Hatch: Q. What did he say?

Mr. Kelly: Objection.

The Court: Q. About that?

Mr. Hatch: Q.—About that? A. He said that they would give me a check for my lost time up to date.

Mr. Kelly: Wait a minute. Move the answer go out, the jury be instructed to disregard it.

The Court: Oh, let it stand.

Mr. Kelly: Exception.

(121) Mr. Hatch: Q. Now, referring to this Exhibit 6, this paper you said you signed, did Mr. Hochberg say anything to you as to whether or not this was a release for your lost time only?

Mr. Kelly: Objection.

Mr. Hatch: Q. You can answer that yes or no.

The Court: Q. You may answer that yes or no.

A. Yes.

Mr. Hatch: Q. All right. Now, limiting your answer to what he said about this paper, what did he say about it?

Mr. Kelly: Objection.

The Court: Q. What did he say about the paper that you signed before you signed it?

Mr. Kelly: If anything.

The Court: Q. —if anything. Before you signed it, if anything? A. He just said that I should sign that paper so I could go back to work.

Mr. Hatch: Q. Now, John, about the loss of time? That—answered that before.

Mr. Kelly: Objection.

Mr. Hatch: Q. Did he say anything about the loss of time? This contained only loss of time?

Mr. Kelly: I object to the form of question, the competency of the question and leading.

Mr. Hatch: I am trying to clarify the former question I asked.

A. Didn't I answer that question yes?

(122) The Court: Withdraw it, start it over again. You have got in there two or three.

A. I get mixed up on both of them.

Mr. Hatch: Q. I understand, John, that you are mixed up. Now, he pushed this paper over to you. Were you sitting down at the table? A. Yes.

Q. He pushed this over to you? A. Yes, sir.

Q. Now, before you signed it did he say anything to you about this \$475.78 representing only—

The Court: Q. What did he say to you about Four Hundred Seventy-five Dollars and some cents?

Mr. Hatch: Q. Yes. Did he say what that was for?

Mr. Kelly: Object to that.

The Court: Q. Did he say anything about it?

Mr. Hatch: Q. You may answer that yes or no. A. Yes.

Q. Did he say what that represented?

Mr. Kelly: Objection.

The Court: Well, that he may answer.

A. For my lost time up to date.

Mr. Hatch: Q. Which is dated the 5th day of September, 1944? A. Yes, sir.

Q. And apparently signed on the 9th because it is dated—

Mr. Kelly: Objection, just a minute. Objection.

Mr. Hatch: This speaks for itself.

Mr. Kelly: All right.

The Court: Yes..

Mr. Hatch: Q. Did he, meaning A. W. Hochberg, tell you (123) at that time that this release contained this language, "In full settlement and satisfaction of, and that he," meaning you, "will and does by these premises, release and discharge the said Akron, Canton & Youngstown Railroad Company from all claims, demands and causes of action whatsoever?"—

Mr. Kelly: Objection.

A. No.

Mr. Kelly: Wait a minute, please. Objection. Where was there any obligation for him to say that? If he was supposed to say that, whether he did or whether he didn't, it is immaterial.

The Court: I think it is.

Mr. Hatch: It is not under the law.

The Court: I will sustain that.

Mr. Hatch: I would like to present a case on that. If he conceals the fact from him that constitutes—

The Court: Now, you are borrowing something that doesn't mean.

Mr. Hatch: Well, I expect to tie that in, Your Honor. I expect to tie that in.

The Court: Well, I will sustain that.

Mr. Hatch: (Proffer) Except and expect the witness to say that A. W. Hochberg did not reveal to him the fact that the so-called agreement and release of September 5, 1944 contained the language which would constitute a full and complete release of all claims and demands whatsoever.

Mr. Hatch: Q. In other words, as I understand you, John, Mr. Hochberg said this was a release for your wages up to date, is that correct?

(124) Mr. Kelly: Objection. Objection. The witness has answered two or three times what Mr. Hochberg said to him.

The Court: He has answered that question.

Mr. Hatch: Well, all right. Except to the ruling.

Q. Do you know, John, that this paper you signed then contained a release of all claims and demands—

Mr. Kelly: Now, objection. Objection. If there is any question about that I want to be heard.

The Court: Well, I will come out and hear you on that.

And thereupon the Court and counsel retired to the Court chambers.

Recess.

Thereupon there was further discussion between Court and counsel and then the jury was returned to the Courtroom.

The Court: Sustain the objection to the last question.

Mr. Hatch: (Proffer) Expect the witness to state that he did not know that the purported release contained a full and complete release of all claims or demands whatsoever as set forth in the Amended Reply.

Q. Did you, Mr. Dice, at the time in September, 1944, when you put your signature to this paper, did you read it? A. No, sir.

Q. Was it read to you? A. No, sir.

Mr. Kelly: Objection. Wait a minute. Objection.

The Court: Sustain it. The first part of the question may stand.

Mr. Hatch: Q. John, was anything said to you by Hochberg about reading this?

(125) Mr. Kelly: Objection.

Mr. Hatch: Q. Did you pick it up?

Mr. Kelly: Now, wait a minute. We have two questions.

Mr. Hatch: I will withdraw the question. Q. Did you attempt to read this?

Mr. Kelly: Objection.

The Court: Did you pick it up? A. Yes, sir.

The Court: All right. We have got that far.

Mr. Hatch: Q. Did you start to read it?

Mr. Kelly: Objection. He said he didn't read it. That is what he said.

Mr. Hatch: Now, I have a different question.

The Court: Well, that is all you have got pleaded. I don't know what else you could prove along that line.

Mr. Hatch: Q. Well, was anything said to you about reading it?

Mr. Kelly: Object.

The Court: Let it in.

Mr. Kelly: Exception.

Mr. Hatch: Go on and answer.

A. When I picked it up and looked at it, he said that, "Oh," he said, "never mind," he said. "Just sign it."

Mr. Kelly: Move the answer go out.

Mr. Hatch: He hasn't answered. Wait until he finishes.

Mr. Kelly: I am sorry.

Mr. Hatch: Go on and finish.

A. He said, "It is just a piece of paper. Just sign it so you can go back to work."

(126) Mr. Kelly: Move the answer go out, the jury be instructed to disregard it.

The Court: You didn't plead anything like that.

Mr. Hatch: That is all—it goes to this question.

The Court: You didn't plead anything like that at all.

Mr. Hatch: Well, that is a matter of evidence. You don't plead all evidence.

The Court: No, of course not.

Mr. Hatch: I think that goes to the question, what induced him to sign. I think that is important, if the Court please.

The Court: Well, we will reserve ruling on that. Let it stand for a minute. I would like to get the scope of what you are trying to prove here if I can.

(127) Mr. Hatch: Q. Did the AC&Y at that time, September, 1944 or any other time pay you any money?

A. Yes, sir.

Q. Wait a minute, John. —for pain or suffering and your injuries? A. No, sir.

Mr. Kelly: Objection. Just a minute, please, objection.

The Court: Sustained.

Mr. Hatch: We plead lack of consideration for that.

Mr. Kelly: Well, you got Nine Hundred and some odd Dollars for something under your own admission.

Mr. Hatch: Yes, for loss of time.

The Court: I will sustain the objection to that question. The jury will disregard the answer.

Mr. Hatch: (Proffer: Expect the witness to testify that he was not paid anything for his personal injury, pain and suffering or medical expense in September, 1944 or at any other time.)

Q. Did you say anything to Mr. Hochberg on that date of September, 1944 about what would happen if you had a recurrence of your disability?

Mr. Kelly: Objection. He has answered that.

Mr. Hatch: I don't recall that.

The Court: Yes, he did. Well, I don't know whether it was let in or not.

Mr. Kelly: Over objection it was let in, Your Honor.

The Court: If it is in, it is in.

Mr. Hatch: Q. You say, as I understand it, you did say something about that? A. Yes.

Q. Speak up. A. Yes.

(128) The Court: I remember him talking about it.

Mr. Hatch: Q. All right. What did Mr. Hochberg say about that?

Mr. Kelly: Objection.

Mr. Hatch: Q. —at that time.

The Court: Q. That you may answer.

Mr. Kelly: Exception.

Mr. Hatch: Q. Now, speak up. A. On what date did you ask me?

Mr. Hatch: Q. Did you understand the question, John? I will withdraw it.

Q. John, as I understand it, before you signed this paper you asked Hochberg, before you signed this paper in September about what would happen if you got a recurrence. Now, is that correct?

Mr. Kelly: Objection.

The Court: He testified to all that.

Mr. Hatch: I am trying to refresh his recollection so that we pin it down. Q. Is that right, John? A. Yes, sir.

Q. All right. Now, did he say anything to you in response to your question at that time and place?

Mr. Kelly: Objection.

The Court: He answered that, too.

Mr. Kelly: Yes.

Mr. Hatch: No, he hasn't.

The Court: He testified to that; he testified to it.

Mr. Hatch: I don't recall.

The Court: Look at this pleading of yours. When you (129) get it all, why, quit.

Mr. Hatch: I think this jury is confused, I know I am, about this whole matter, how much is in, how much isn't in.

Mr. Kelly: I don't think the jury is but I will agree that you are.

Mr. Hatch: Thank you. We all aren't as competent as yourself.

Mr. Kelly: Stick to your pleading.

Mr. Hatch: I asked a question.

The Court: He already answered it.

Mr. Kelly: Yes.

The Court: I am sure.

Mr. Hatch: Q. As I understand the answer, John, you said Mr. Hochberg said to you, "We will reopen the case"?

Mr. Kelly: Objection.

The Court: Mr. Hatch, it is in your record now. It is in there now. You have got it all in.

Mr. Hatch: All right.

The Court: The problem is whether it should stay there. That is where I have to worry.

Mr. Hatch: You may examine.

• RE-CROSS EXAMINATION by Mr. Kelly.

Q. Mr. Dice, how old were you on September 9, 1944?

The Court: Q. You said yesterday, about fifty-one?  
A. Fifty-one.

• Mr. Kelly: Q. All right. Could you read on September 9th, 1944? A. Yes, sir, by ?

Q. Could you write on September 9th—on September 5, (130) 1944? A. Yes, sir, script.

• Q. What? A. Scribble.

Q. Scribble? I see. You voluntarily on the 5th of September, 1944, went down to the office of the AC&Y, didn't you? A. Yes, sir.

Q. And you voluntarily took with you on that day a statement which you had received from Dr. Schaffner, identified as Plaintiff's Exhibit 16, didn't you? A. Yes, sir.

Q. And you voluntarily went up to Mr. Hochberg's office, didn't you? A. Yes.

Q. You voluntarily stayed there how long? A. I can't say just how long.

Q. What is your best judgment? A. On a rough guess, an hour.

Q. And how many people were in the room where you found Mr. Hochberg? A. I did not count them.

• Q. Well, how many would you say there were there?  
A. Oh, I don't know, six or eight of them, I judge.

Q. How many men were there there? A. I do not know.

Q. Some of them were men in addition to Mr. Hochberg, weren't they? Was anybody there in addition to Mr. Hochberg, any men in addition? A. Not that I can recall.

The Court: Q. Any girls or ladies? A. There was ladies.

Mr. Kelly: Q. How many? A. I can't recall. I did not count them.

Mr. Kelly: Q. Where were the ladies in respect to where you talked to Mr. Hochberg? A. Back just like; —back (131) around at the desks.

Q. How far? A. Oh, I can't just say how far it was.

Q. It was during the daytime when you went to Mr. Hochberg's office? A. Yes, sir.

Q. Mr. Hochberg's office had windows in it? A. Yes.

Q. It was daylight? A. Yes, sir.

Q. Nothing to interfere insofar as atmospheric conditions from your seeing? A. No, sir.

Q. Were any lights burning in the office that day? A. I can't recall whether there were or not.

Q. You went in, you sat down at his office, his desk? A. At his desk.

Q. You sat there how long? A. I said, about an hour.

Q. All right. A. As far as I can recollect.

Q. Mr. Hochberg sat there at the desk, too; didn't he? A. I sat.

Q. On that occasion, Mr. Hochberg got out some books, records and papers and laid them on the desk in front of you, didn't he? Didn't he? A. Not that I can recall.

Q. Didn't you see him do some figuring there while you sat there at his desk? A. On a piece of paper?

Q. Yes. Right in front of you, didn't he? A. Yes, sir.

Q. That is right. You could read and see what was going on there at that time, couldn't you? A. I wasn't watching his figures.

Q. You could read and see what was going on there at that time, couldn't you? A. If I had looked.

Q. Yes. If you had looked. Did anyone ask you to sit (132) down at that desk? A. No, that is where—

Q. Did anyone ask you to talk to Hochberg? A. No, sir.

Q. Did anyone ask you to stay at that desk? A. No, sir.

Q. You stayed there voluntarily, didn't you? A. That is where I always go.

Q. Yes, sir. You went in there voluntarily? A. Yes, sir.

Q. You left voluntarily? A. Yes, sir.

Q. While you were there, people were coming and going through this room when you sat there at this desk, didn't they? Isn't that a fact? A. Now, just wait. In what way do you mean going through the room?

Q. Well you said while you sat at the desk with Mr. Hochberg people walked to and from the place where you were seated? A. They walked there, not walked the other way.

Q. Through this room, is that right? A. Yes.

Q. After you had been there about an hour at Mr. Hochberg's desk, you signed this document identified as Plaintiff's Exhibit 6, didn't you? A. Yes, sir, I did, sir.

Q. You signed it in three places? A. Yes, sir.

Q. You signed it? A. Yes.

Q. This document has your signature on? A. Yes.

Q. How many other documents did you sign there that day? A. Just only one, isn't it?

Q. How many times did you sign your signature there that day, Mr. Dice?

Mr. Hatch: He has said three times.

Mr. Kelly: I am asking a question, please.

A. Three times as far as I know.

(133) Q. All right. I hand you what is identified as Defendant's Exhibit 18, and ask you if your signature appears there? A. Yes.

Mr. Hatch: Now, wait a minute. Let me see it. That is a copy.

Mr. Kelly: That is an original. I refer you to Defendant's Exhibit 18 and ask if you signed that to your knowledge? A. Yes, sir.

Q. Three times with ink? A. Yes.

Q. And you signed it at Mr. Hochberg's desk on the 5th of September, 1944, didn't you? A. Yes, sir.

Q. And you signed it at the same time when you signed this one, Plaintiff's Exhibit 6, didn't you? A. It—what is—

Q. Look at it and tell us whether both of those papers were signed there at that time by you?

Mr. Hatch: Well, if he knows it is his signature.

Mr. Kelly: He said it is his signature.

Mr. Hatch: All right. That is your answer.

Mr. Kelly: Q. You signed there, you signed both of those papers at the same time while you sat at Mr. Hochberg's desk, didn't you? A. Yes, sir.

Q. In other words, you affixed your signature six times to two pieces of paper? A. Yes.

Q. Now, you say to this court and this jury you didn't read that paper? A. No, sir.

Q. You say you didn't? You mean to say you didn't read it? Is that what you mean to say? A. I did not read them.

(134) Q. Did you read either one of these papers which you signed? A. I did not.

Q. All right. While you were there seated at Mr. Hochberg's desk, a lady came over to the desk where you were seated, didn't she? A. Not that I can recollect.

Q. All right. Did you see any typing done on either one of these papers while you were there that day, Mr. Dice? A. No, sir.

Q. Don't you know—You can see now that there is matter typewritten on those papers, can you not? A. Yes, sir.

Q. Can you tell us when that was done? Do you know when the typing was done there, Mr. Dice? A. I can't tell you when it was done.

Q. Well; when you signed these papers did you look to see whether there was any typing on them at all? A. No, sir, I did not.

Q. Now, before you left there that day you were given a check, weren't you? A. Yes, sir.

Q. Where did that check come from, if you know, insofar as being revealed in your presence while you sat there? A. Come from the AC&Y Railroad.

Q. Well, who gave it to you? Who handed you the check? A. Mr. Hochberg.

Q. Did you see where he got that check? A. No, sir.

Q. While you were seated there at that desk Mr. Hochberg got up and left the desk and left the room, didn't he? A. Yes, sir.

Q. And when he returned to this room, he had a check (135) in his hand, didn't he? A. Yes, sir.

Q. And he handed you the check, didn't he? A. After I signed the paper.

Q. Yes, sir. He handed you the check after you had signed these two papers, didn't he? A. Yes.

Q. Did you look at the check there at his desk? A. I presume I did.

Q. Well, did you? Not what you presume. Did you? A. Yes.

Q. Did you read it? A. No.

Q. What did you look at it for? A. See how much amount was on it.

Q. What did you see? A. Well, give it here and I can tell you.

Q. All right. (Handing paper to witness) A. \$475.78.

Q. What else did you see when you looked at the check? A. That is all I looked at.

Q. That is all you looked at? Didn't you look to see if it was payable to John F. Dice? A. Yes. My name was on it.

Q. You looked to see if your name was on it? A. Couldn't help but see it.

Q. All right, then. You saw it? A. Yes.

Q. Then you read that part? A. My name and how much.

Q. Did you read anything else on the check? A. No, sir.

Q. When you left that office, you left with that check, didn't you? A. Yes, sir.

Q. You didn't even fold it up, did you? A. No.

Q. Stuck it in your pocket? What day of the week was (136) that there? A. Couldn't tell you.

Q. What did you do with the check? A. Cashed it.

Q. When? A. I presume that day.

Q. Well, let me refer you to the back of it. Is that your signature on the back of that check? A. Yes, sir, that is.

Q. Did you not take that check to the Firestone Bank on the 6th day of September, 1944, or some place else and get some money on it? A. I cashed it some place.

Q. Where did you cash it? A. I do not know.

Q. You do not know? A. I do not know.

Q. You got the cash on it, didn't you? A. Yes, sir.

Q. How long did you have that check in your possession before you cashed it? A. Well, now, I couldn't answer that. I don't know.

Q. Twenty-four hours? A. Somewhere along there.

Q. And during that period of time did you look at the check to see what was on it? A. No, sir.

Q. You didn't even read it? A. No.

Q. I see. You look at this check and see if you detect any difference between its condition today than it was at the date you received it except the words written in ink, "Exhibit Number 12-defendant."

Mr. Hatch: Object.

The Court: Q. See whether any difference.

Mr. Hatch: The bank stamp is on there, of course.

Mr. Kelly: I asked him what the difference is. I want him to tell the difference.

(137) Mr. Hatch: If he knows. He said he didn't look at it.

A. I don't see anything.

Mr. Kelly: Q. Didn't you read these words—

Mr. Hatch: I object. Can I have a ruling on it?

May I have another objection, also?

The Court: Whether the check looks any different?

Mr. Hatch: The question, yes.

The Court: Overruled.

Mr. Kelly: Q. Mr. Dice, do you say to this jury and this Court that you at no time read the following on this check,—now I quote, "In full settlement account injury received at Rushmore, Ohio, 10:08 A. M. on May 29, 1944"?

Mr. Hatch: Object.

The Court: He can answer that, whether he saw it or whether he didn't.

A. No, sir, I did not.

Mr. Kelly: Q. It was on there when you got it, wasn't it? A. I am not saying; I don't know.

Q. You wouldn't say to this court and this jury it was not on there when you were handed this check, would you? A. I don't know if it was or not. I would not say.

The Court: Q. Because you never looked? A. No. That is the first I have seen it.

Mr. Kelly: Q. Now, on September 5, 1944, you were not mentally incapacitated, were you? In other words, you weren't insane? A. I hope not.

Q. Nothing wrong with your mind? A. I hope not.

Q. All right. Well, you know there wasn't, don't you? (138) A. Yes, sir.

Q. All right. And you hadn't been in the hospital since June 2, 1944, had you? A. I was in for X-rays after that, I think.

Q. Not for treatment, anything like that? A. No.

Q. You weren't under the influence of narcotics or opiates or drugs on September 5, 1944, when you were in Mr. Hochberg's office, were you? A. No, sir.

Mr. Kelly: That is all. Reserving the right for further cross examining the witness.

RE-DIRECT EXAMINATION by Mr. Hatch.

Mr. Hatch: I have just a few questions, if Your Honor please.

Q. Mr. Kelly asked you about these Exhibits 6 and 18, with reference to some typing in there. I believe you stated you did not know whether that was in there or not, is that true? A. Yes, sir. I don't recollect if it was or not; I wouldn't swear.

Q. It could have been blank as far as you are concerned, couldn't it?

Mr. Kelly: Objection.

Mr. Hatch: I think he can answer that.

The Court: That is argumentative.

Mr. Kelly: Yes.

The Court: Sustained.

Mr. Hatch: All right.

The Court: He said he didn't read it.

Mr. Hatch: Q. How long did you go to school, John?

(139) Mr. Kelly: Objection.

Mr. Hatch: You asked about his mentality, etc.

Mr. Kelly: On September 5, 1944.

Mr. Hatch: All right. If it has a bearing on that.

Mr. Kelly: He has admitted he can read.

The Court: I will sustain it because the man says all along he never read any of these documents; he could have read them but he didn't.

Mr. Hatch: It has to do with whether or not he is an educated man and whether or not Mr. Hochberg is an educated man. It has to do with whether or not— or whether or not he relied on misrepresentation of Mr. Hochberg. He went in, asked him if he could read and write. I think we have a right to show the jury how well he can read and write.

The Court: If you are claiming a disability here, that would be a different thing, but you aren't.

Mr. Hatch: On cross examination he went in to that, as to his ability. I think the jury has a right to know.

Mr. Kelly: You are claiming we perpetrated a fraud, let's stick to that.

The Court: By said representation.

Mr. Hatch: That is right. You went into his qualifications of reading and writing. I think we have a right to go into that.

The Court: Q. You can read, can't you? A. Very little.

The Court: Q. But you never attempted to read these instruments? A. Couldn't read.

The Court: Q. Didn't try to read? A. No, I can't even—

(140) The Court: Q. You didn't try to? A. I picked up the one to try to read it and he told me that I didn't need to; just sign it.

Mr. Hatch: Q. And you relied on that, didn't you, John?

Mr. Kelly: Objection; objection.

The Court: You have to rely on what you plead.

Mr. Hatch: That is claimed, that we—Do I understand the Court refuses to permit us to go into that matter of his schooling and his ability to read and write?

The Court: You don't claim that in your Petition. You don't claim that there was any deception or fraud of that kind.

Mr. Hatch: The Court permitted the defense to go into that matter. This is a matter of rebuttal of that.

The Court: The defense didn't go into his education.

Mr. Hatch: Went into his ability to read and write.

Mr. Kelly: On September 5, 1944.

Mr. Hatch: All right. That all goes to that.

The Court: Well, what may be proper there in the way of cross examination doesn't permit you to go into another issue that you never pleaded or claimed. There doesn't seem to be any end to the claim. I have to go by your reply you filed.

Mr. Hatch: It goes to determine he relied on that representation.

The Court: There is a way to get at that.

Mr. Hatch: All right. I asked him and he said yes he did. You ruled that out.

The Court: No, you didn't ask him that at all. You never (141) asked him that yet. That isn't what you asked, if he relied on the representation. That wasn't what you asked him about there.

Mr. Hatch: Q. John, you stated, I believe, that Mr. Hochberg represented that this release was a release only for your wages up to date, is that correct?

Mr. Kelly: Objection.

The Court: Well—

Mr. Hatch: I am getting back.

The Court: Yes, all right.

Mr. Hatch: So I can ask.

The Court: That is just a repetition of what he said. All right. Let it go.

Mr. Hatch: Q. Did you? A. Yes.

Mr. Kelly: Objection.

Mr. Hatch: Q. Did you answer?

The Court: Not did he.—He already said, he said that.

Mr. Hatch: Q. All right. He said that, did he not?

A. Yes, sir.

Q. Did you rely on that representation, John?

Mr. Kelly: Objection.

The Court: Q. You may answer that.

Mr. Kelly: Except.

A. Yes, sir.

Mr. Hatch: All right. All right.

Mr. Kelly: Wait a minute.

Mr. Hatch: What is this, further re-cross?

The Court: Well, you got further direct. I don't know (142) why he shouldn't get further cross.

#### RE-CROSS EXAMINATION by Mr. Kelly.

Mr. Kelly: Q. Mr. Dice, you went back to work the next day or a day or two later, didn't you? Went back two days later, didn't you? 7th of September, 1944? A. Yes.

Mr. Kelly: May I have the petition please?

The Court: This then must be wrong.

Mr. Kelly: Q. The original petition. You worked up until April 24, 1947, for this Company, didn't you?

A. What date did you say?

Q. April 27th, I believe, or 24th, 1947? A. Yes, sir.

Q. And before that date on different occasions you had been asked to come up and take your examination for an engineman, hadn't you? A. Yes, sir.

Q. And you said this morning to this jury that you had pain and distress on the 24th of April, didn't you? A. Yes, sir.

Q. You voluntarily went up for this examination on the 24th of April, 1947, didn't you?

Mr. Hatch: Now, I object.

Mr. Kelly: Q. You may answer. A. I don't remember what day it was.

Q. All right. And you said to this jury a while ago that you could just barely scribble, didn't you? A. Yes, sir.

Q. I hand you what is identified as Defendant's Exhibit 27, and ask you if that isn't your examination paper which you took, which you filled out on the 24th day of April, 1947, look at it carefully. A. I did.

Mr. Hatch: Let me see.

(143) Mr. Kelly: Q. And you started in to take this examination voluntarily, didn't you? A. Yes, sir.

Q. And you voluntarily walked out on this examination on that date, didn't you?

Mr. Hatch: Object.

Mr. Kelly: Let him answer. Says he can't read and write.

Mr. Hatch: I object to the form of the question.

Mr. Kelly: Q. You started to take this examination, didn't you? A. Yes, sir.

Q. And you quit before it was finished, didn't you?

A. Yes, sir.

Q. And you quit voluntarily, didn't you? A. By the doctor's request.

Q. I did not ask you that. No doctor was with you when you took this examination, was he? A. No.

Q. How long did you spend in taking this examination that day? A. Oh, I don't know just how many hours I was there.

Q. And you got up and walked out and left the paper on the desk, didn't you? A. The girl had to go to dinner.

Q. You voluntarily left it there, didn't you? A. I wasn't supposed to take it with me.

Q. No one asked you to leave? A. Yes.

Q. Who? A. The girl in the office.

Q. Who was the girl? A. I don't know her name.

Q. Then on the 21st of May, 1947 you filed this lawsuit, didn't you? A. Yes, sir.

(144) Q. In which you asked for Fifty Thousand and some odd Dollars, is that right? A. Yes, sir.

Q. Now, between the date of September 5, 1944 and May 21, 1947, did you ever go back and talk to Mr. Hochberg and say to him, "I have been cheated. You have defrauded me."? A. No, sir.

Q. Did you ever go down and talk to Mr. Stewart, the President of this Company, between September 5, 1944 and May 21, 1947, and say to Mr. Stewart, "I have been cheated; you have defrauded me"? A. No, sir.

Q. Did you ever go down and talk to Mr. Watkins between September 4, 1944 and May 21, 1947 and say to Mr. Watkins, "I have been cheated; you have defrauded me"? A. No, sir, not them words.

Q. All right. Did you ever go and talk to Mr. Wilkerson?

Mr. Hatch: Wait a minute.

Mr. Kelly: Q. Did you ever go and talk to Mr. Wilkerson and say to Mr. Wilkerson, "I have been cheated and I have been defrauded"? A. I don't know the gentleman.

Q. And the first time you ever said anything on any occasion about being cheated was on August 4, 1947, after you had sued in this Court, had sued in this case, isn't that right? Read it carefully. A. You read it to me. I can't.

Q. Is that your signature on February 3rd on that document? A. Yes, sir. That is my handwriting.

Q. Did you read it when you signed it? A. No, sir.

(145) Q. Was it read to you? A. I don't even know the paper.

Q. Well, look at it, please.

Mr. Hatch: I read it to him.

Mr. Kelly: Let him answer.

Mr. Hatch: I believe. Let me see.

Mr. Kelly: Wait a minute. Now, let him answer.

Mr. Hatch: Let's see what it is.

Mr. Kelly: Q. You know what it is. A. I don't know what it is.

Mr. Hatch: Yes.

Mr. Kelly: Q. Was that paper read by you or read to you, Mr. Dice? A. It looks like the paper that Mr. Hatch wrote, so—

Q. When did he read it to you? A. Well, I can't just say when.

Q. Well, was it read to you?

Mr. Hatch: There is a date on it.

Mr. Kelly: Let me cross examine this witness, please.

Mr. Hatch: It speaks for itself. I object.

The Court: Q. You may answer.

Mr. Hatch: If he knows. He answered it, said he didn't know exactly.

Mr. Kelly: Q. Was it read to you by Mr. Hatch on or about August 2, 1947, Mr. Dice? A. Yes, sir.

Q. Did you know what you were signing when you signed that document? A. I guess I did, or I wouldn't have signed it.

Q. All right. Now, I hand you another paper denominated "Amended Reply," and ask if your signature appears on that? (146) A. Yes, sir.

Q. Was that signed by you on or about the 25th day of May, 1949? A. Yes, sir.

Q. Did you read it? A. No, sir.

Q. Was it read to you? A. Yes, sir.

Q. Did you know what you were signing when you signed it? A. Yes, sir.

Mr. Kelly: That is all, reserving the right for further cross examination.

The Court: Well, it is a good time to adjourn, members of the jury.

Mr. Hatch: I will have a few questions Monday morning, Your Honor.

The Court: Oh, that is right. This goes over to Monday, doesn't it? Members of the jury, it is the Court's duty to again admonish you not to discuss this case outside the courtroom with anyone, nor permit anyone to communicate with you concerning this lawsuit, not to form any opinion in this matter until you have heard all the evidence and the cause is finally submitted to you. With those admonitions you are now excused.

Mr. Kelly: Just one thing, Your Honor. At this time I want the record to show that formal demand is made by the defendant upon the plaintiff for the production of a copy of his 1944 Income Tax Return.

Mr. Hatch: Oh, we will. Q. —will you bring those in Monday, John? Be glad to. A. Yes, if I can.

Mr. Hatch: What years? '45, '46?

(147) Mr. Kelly: '45.

Mr. Hatch: '48, '49?

The Court: Whatever you have from 1944 on.

Mr. Hatch: Yes. Bring them in Monday, John.

The Court: All right.

Mr. Hatch: Be glad to do that.

And thereupon Court adjourned until nine o'clock A. M. October 17th, A. D. 1949, at which time Court having convened pursuant to adjournment, the trial of said case proceeded as follows:

(Mr. Dice again on the stand for further re-direct examination by Mr. Hatch.)

#### RE-DIRECT EXAMINATION by Mr. Hatch.

Mr. Hatch: Q. Mr. Dice, request was made of you Friday to see if you could find your old—your copies of your old Tax Returns. Did you look for those? A. Yes, sir.

Q. Were you able to locate them? A. No, sir, I could not.

Q. Were you able to locate the wage slips, the W-2 forms that the employer gave you? A. No, sir.

Mr. Hatch: If the Court please, the Company here from their records has made a breakdown of Mr. Dice's earnings during the period of employment from 1941

through 1947, and I am willing to let that go in. We can't find ours and I take it that these are the correct records and I will accept them, and have this identified as an exhibit, and ask the Court to admit Plaintiff's Exhibit 7.

The Court: No objection?

Mr. Hatch: Q. Now, Friday afternoon, Mr. Kelly asked (148) you as to whether or not you had any conversations with Mr. Stewart who is the President of the AC&Y, Mr. Hochberg, Mr. Watkins and Mr. Wilkerson, as to whether or not you had conversation with them and told them that you had been cheated. Now does that refresh your recollection? A. Yes, sir.

Q. Now, calling your attention to April of 1947, I will ask you whether or not you had a conversation with Mr. Hochberg; after you left work and reported off, did you have a conversation with him right after that? A. Yes, sir.

Q. And where was that conversation? A. Down at the AC&Y Building, Mr. Hochberg's office.

Q. I hand you what has been marked Plaintiff's Exhibit 8, and ask you if you took that piece of paper to Mr. Hochberg at that time? A. I did, sir.

Q. Where did you get that? A. Got that from Dr. Schaffner.

Q. Speak up. A. Dr. Schaffner.

Q. You handed Plaintiff's Exhibit 8 to Mr. Hochberg? A. Yes, sir.

Q. All right. What did he say?

Mr. Kelly: Objection.

The Court: What did Mr. Hochberg say?

Mr. Hatch: Yes. Q. —to you.

The Court: Q. You may answer.

Mr. Kelly: Exception. A. Why, he—

Mr. Kelly: May I point out, Your Honor—ask Your Honor what is the basis for this testimony? My question was confined (149) to one thing, whether he had had any conversation between September 9, 1944 and April 24, 1947 relative to whether he had been cheated or defrauded.

The Court: The only objection I could see was previously he has answered already.

Mr. Kelly: He said no.

Mr. Hatch: No. He said—you didn't let him finish. You required a no answer, you didn't let him tell what conversation he had. I think this jury is entitled to know what the whole story is, Your Honor.

Mr. Kelly: The jury is entitled to know the story insofar as it relates to this one element of cheating or defrauding. I have no objection to that, but going into other things I object to.

Mr. Hatch: That is, we can—we can ask that—You don't know what he is going—

The Court: Let's hear—

Mr. Kelly: That is what I am objecting—

The Court: —what he says.

Mr. Hatch: Q. All right. Will you answer? Read that.

And thereupon the reporter read the last question to the witness as follows: "Q. What did Mr. Hochberg say—to you?" A. Well, I took that paper into him and laid it down on his desk. He read it. He took it over to Mr. H. G. Watkins. He came out of Mr. Watkins' office and he said, "Dice," he said, "We can't do anything for you," he says, "No dice for Dice."

Q. All right.

Mr. Kelly: Now, wait a minute. Move the answer go out; the jury be instructed to disregard it.

(150) The Court: Q. Is this the day you signed this instrument you are talking about?

Mr. Kelly: This is three years almost; two and one-half years later.

The Court: Well, I don't think that that is competent.

Mr. Hatch: It has to do as to whether or not he had any conversation with any of these people with reference to his claim here.

Mr. Kelly: That wasn't my question.

The Court: I don't think the conversation two years after is competent anyway. I will sustain it.

Mr. Hatch: Except.

Q. After that did you have a conversation with Mr. Stewart? A. Yes, sir.

Q. All right. Will you tell the jury what that conversation is?

Mr. Kelly: Objection.

The Court: Q. Was this long after you signed the release? A. Yes, sir.

The Court: I don't think that is competent.

Mr. Hatch: Of course, if Your Honor please; it is rebuttal to what he asked, whether he had talked to anybody at the company about cheating—cheating him. Of course, this is when he had the reaction; this is what the claim is based on.

The Court: He said the other day, no; he didn't have.

Mr. Hatch: If the Court please, he said "Not in those words." That was his answer, and he did not per-

mit him to go (151) on—on and tell the jury what did he say.

The Court: Q. When is this conversation with Mr. Stewart? A. Right after I got through with Mr. Hochberg, I went upstairs to Mr. Stewart's office.

The Court: (To attorney) Come up here. (Confidential discussion.)

Mr. Hatch: Does the Court want to make a ruling?

The Court: Sustained.

Mr. Hatch: All right.

The Court: Are you finished with cross examination of this man?

Mr. Kelly: Reserving the right of further cross examination.

The Court: All right.

Mr. Kelly: I think this list of wages—

The Court: They are received in evidence. I will receive them.

Mr. Hatch: Well, the plaintiff then will rest.

The Court: All right. Has he offered all exhibits he wants to offer?

Mr. Hatch: I think those photos were all admitted.

The Court: Yes, they were before.

Mr. Hatch: And the hospital report.

The Court: Yes, that was received.

Mr. Kelly: How about Exhibit 6? How about 6?

Mr. Hatch says he is not offering it, Your Honor.

Mr. Hatch: Do you want to offer?

Mr. Kelly: Not at this time.

(152) The Court: All right, if you don't want to offer it.

Mr. Kelly: At the conclusion of plaintiff's evidence defendant moves that all the evidence be withdrawn from

the consideration of the jury and the jury instructed to return a verdict for and on behalf of the defendant.

The Court: Why don't you offer Exhibit 6?

Mr. Hatch: Let it in then.

(Which said exhibits, marked Plaintiff's Exhibit 6 and Plaintiff's Exhibit 7 are hereto attached and made a part of this Bill of Exceptions.)

Mr. Kelly: No. 6? Where do we stand?

Mr. Hatch: Now we rest.

Mr. Kelly: At the conclusion of plaintiff's evidence, defendant moves that all evidence be withdrawn from consideration of the jury and the jury instructed to return a verdict for and on behalf of the defendant.

The Court: Overruled.

And thereupon, in order to maintain the issues upon its part to be maintained, the defendant called as a witness one HAROLD ROSS HYATT who, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Kelly.

Mr. Kelly: Q. Will you state your full name, please?

A. Harold Ross Hyatt.

Q. Where do you live? A. New London.

Q. That is in Ohio, western part of the State, is it more central? A. North central.

(153) Q. How old are you? A. Forty-one.

Q. For whom do you work? A. AC&Y Railroad Company.

Q. How long have you worked for that Company?

A. Twenty-four years.

Q. Still employed? A. Yes, sir.

Q. What kind of work do you do? A. Track supervisor.

Q. What kind of work were you doing in May, 1944?  
A. Section foreman.

Q. Briefly, what were your duties at that time? A. Maintenance of seven miles of track.

Q. And did that seven miles of track include the territory known as Rushmore? A. Yes, sir.

Q. Now, directing your attention to May 29, 1944, you knew that there was a derailment of an engine and some cars on that date, did you not? A. I heard of it.

The Court: Was it the 29th or 30th?

Mr. Kelly: 29th, to be exact.

Q. And prior to the time, exact time of that derailment, when was the last time you had been over that section of track? A. Four days.

Q. Now, confining your attention to that location, that is, that track runs in a generally easterly and westerly direction, does it not? A. Yes.

Q. And is the track straight? A. Yes.

Q. For what distance is it straight east of Rushmore? A. About a mile.

Q. For what distance is it straight west of Rushmore? A. A mile.

Q. So you have two miles of straight track? A. That is (154) right.

Q. What is the grade of that two miles? That is, is it level? A. Level.

Q. Are there any curves in that two mile stretch?  
A. None.

Q. Now, and at that switch track that leads from the main track at Rushmore, Mr. Hyatt— A. Two in switch.

Q. What do you mean by two in switch? A. Well, beet track switch and switch.

Q. Which side of the main track is the beet switch on? A. Lefthand side.

Q. That would be the south side by compass, would it not? A. That is right.

Q. Now, does the beet track leave and come back to the main track? A. It does not.

Q. Where is the switch point for the beet track? That is, which end of the switch is it on? A. East end.

Q. Will you explain what is meant by switch point, Mr. Hyatt? Just explain. A. A switch point is a piece of rail fifteen foot long. There is two of them, one right, one lefthand, and the train has to go into that side, the switch-stand has to be unlocked and points throwed over to the rails.

Q. In other words, the rails constituting the switch track at the junction have to be moved in such a position that the wheels of a car or engine or locomotive can turn over on to those switch rails, is that correct? A. That is correct.

Q. That is done by means of a switch? A. Switch-stand.

Q. Now, what kind of a switch stand was there? A. High (155) type.

The Court: Q. What do you mean by high type? A. Well, we have a low type about two feet off the ground, the other is about six or seven feet.

Mr. Kelly: Q. Is that a hand-operated switch? A. Hand-operated.

Q. About how high is the top of the switch? A. About seven feet from the ground.

Q. Is it not a fact on the top of the switch stand there are two cross sheets or faces or plates, Mr. Hyatt?  
A. That is right.

Q. What color are they? A. Red and green.

Q. Now, what side of the main track was that switch stand on? A. South side.

Q. Now, tell us the type of rails that were in the main track at this particular location? A. Well, ninety pound rail.

Q. What does that mean? A. Ninety pound to the yard, that is what they mean.

Q. Are those standard railroad rails? A. They are.

Q. What kind of ties were there at that location?  
A. Light—white oak.

Q. What? White oak? A. That is right.

Q. What was the condition of these ties at that location? A. Good.

Q. What type of ballast was there at this location?  
A. Stone ballast.

Q. What kind? A. I guess you would call it limestone.

Q. What is the spacing of ties, that is, how many (156) ties to the mile, Mr. Hyatt? A. I just couldn't tell that offhand. They are spaced twenty-one and twenty-two inch centers.

Q. That is, the ties themselves are twenty-one and twenty-two inches apart from center to— A. On main line switch work, we put them twenty-one.

Q. Isn't it a fact in this location there are three thousand ties to the mile? A. They run a little more than that.

Q. They run a little more than that? A. That is right.

Q. What was the condition of the roadbed at this location on May 29, 1944? A. The roadbed was solid.

Q. Solid? Were there any streams of water or waterholes around this switch point? A. None at all.

Mr. Hatch: Object. He said he hadn't been there until four days—after four days before.

Mr. Kelly: I assume if a stream of water was there, it would be there four days before. Were there any culverts around this switch-point? A. No culverts.

Q. What was the general topography of the land in that section of the State, Mr. Hyatt? A. What do you mean, level?

Q. Yes. A. It is all level.

Q. Farm country? A. Farm country.

Q. Is Rushmore a village, do you know? Or is it just a little, an incorporated village? A. No. Just a little four-corners in a road.

Q. About how many people live there, do you have any idea? A. About two hundred fifty.

(157) Q. You say, ~~an~~ incorporated? A. That is right.

Q. Is there a grade crossing in this vicinity? A. Well, a crossing right west of the switch.

Q. Oh, what is the fact as to whether or not the rails of the main track were connected and joined? A. Connected and joined with an angle-iron.

Q. Was every rail in this vicinity joined with an angle bar?

Mr. Hatch: Object.

Mr. Kelly: If he knows. He is charged with the maintenance of it.

Mr. Hatch: When?

Mr. Kelly: May 29, 1944.

Mr. Hatch: Object. He said he wasn't there.

Mr. Kelly: He can tell the general type of construction of the track.

The Court: Well, that is for the jury, the weight to be given to his testimony.

Mr. Kelly: Q. Now, how are the rails joined together, Mr. — A. With an angle bar. There is four bolts in each angle bar, every joint.

Q. Now, were you at the scene of the accident after the accident? A. I was.

Q. About what time were you there, did you get there? A. Got there around eleven-thirty.

Q. In the morning? A. That is right.

Mr. Hatch: Q. What day?

Mr. Kelly: Q. What day? A. The 29th.

Q. Tell the Court and jury whether the rails on the main (158) track east of the switch point were intact when you got there? A. The rail east of the switch point was intact when I got there.

Q. Were they twisted or bent or torn out of place, knocked out of place, east of the switchboard? A. They were not.

Q. Did you examine the ties of the main track east of the switch point? A. I did.

Q. And tell what you found, if anything, in respect to the condition of the ties east of the switch point. A. The ties were just in the same condition they were four days previous to the accident, good condition.

Q. I believe it is a fact that the track, the rails and the track west of the switch point was torn up and damaged, is that right? A. That is right.

Q. Was there a frog located at this switch point; I mean, near the switch point. A. There is a frog about seventy-two feet west of the switch point.

Q. Now, explain to the court and jury what a frog is, Mr. Hyatt? A. A frog is a piece of rail used for passing trains from one track to another.

The Court: Q. That is, it moves? A. No, it don't move. Just one side of it moves, the swing rail on there that spreads apart and lets the flange of the wheel through it.

Q. Now, when you got out there at eleven o'clock, did you personally inspect the track, the ties, the rails, and everything east of the switch point? A. I did.

Q. And tell the court and jury whether you observed any kind of a defect in the ties or track or roadbed or rails, (159) anything east of the switch point? A. I didn't find any defect in the rail, ties, ballast or anything east of the switch point for a mile.

Q. Did you look to see if there was anything wrong?

A. That is right. I got to look.

Mr. Kelly: You may inquire.

#### CROSS EXAMINATION by Mr. Hatch.

Mr. Hatch: Q. Was that beet track torn up, too?

A. Yes, sir.

Q. Now, that goes off east, I mean south—to the south, does it not? A. It leads off from the main line to the south.

Q. Was the track west of the switch torn up? A. What do you mean?

Q. West of the switch? A. The beet track?

Q. Was the main track? A. The main track was tore up west of the switch.

Q. So that both the main track and the beet track were torn up west of the main track? A. That is right.

Mr. Hatch: That is all.

Mr. Kelly: That is all. Step down.

And thereupon, in order to further maintain the issues upon its part to be maintained, the defendant called as a witness one DELBERT BARRY who, being first duly sworn, testified as follows:

(160)

DIRECT EXAMINATION by Mr. Kelly.

Q. Will you state your full name? A. Delbert Barry.

Q. Where do you live, Mr. Barry? A. I live in Gomer.

Q. How old are you? A. Forty-nine.

Q. Where do you work? A. AC&Y Railroad.

Q. How long have you worked for that company?  
A. Twenty-six years.

Q. Still employed? A. Yes, sir.

The Court: Q. Thirty-six? A. Twenty.

Mr. Kelly: Q. What kind? What did you do, — what do you do now? A. I am a section foreman.

Q. How long have you been a section foreman? A. Twelve years.

Q. Where were you working in May, 1944? A. Delphos.

Q. Delphos? Delphos is where, Mr. Barry? A. End of the road.

Q. Where, in what part of Ohio; with respect to Ohio, is it in the western part of the State? A. Yes.

The Court: Q. That is west—this way, that is west.

Mr. Kelly: Q. Now, what were your duties in May, 1944? A. My duties was, go over and help Mr. Hyatt.

Q. Was he your superior or boss? A. No, sir, Mr. Brown was.

Q. Mr. Brown? Now, you know there was a train wreck on the 29th of May, 1944, do you not, there at Rushmore? A. I did, later on.

Q. When did you learn of that wreck? A. Eleven o'clock.

Q. In the morning? Tell the court and jury the last time you passed over that track before eleven o'clock on that (161) morning? A. Well, I went over. I had an order to go over help Mr. Hyatt work on the Y. My time to start was seven-thirty.

Q. In the morning? A. That is when I start.

Q. All right. I got to Rushmore about eight. I always figure on beating the passenger in there so I can help. I got into Delphos about nine.

Q. Did you go west to east or east to west? A. I went from Vaughnsville.

Q. From Barnesville? A. No, Vaughnsville.

Q. That is east of Rushmore? A. Yes, sir.

Q. How far east? A. About six miles.

Q. How did you get from Vaughnsville to Rushmore? A. Motor-car.

Q. What do you mean? A. Gasoline engine.

Q. Is that what we used to call the old-fashioned handcar? A. Handcar you pump, motor car runs by cylinder.

The Court: Q. This is a handcar you don't pump? A. Yes.

Mr. Kelly: Q. This motor car you rode, did you go west on the main track? A. Yes, sir.

Q. Did you cross over the switch point at the beet track switch at Rushmore? A. I did.

Q. What were your duties in respect to observing the track that particular morning? A. My duties is to patrol that track, switch or switch points at five miles an hour.

Q. Is that one of your regular duties? A. It is when I go to help.

Q. Do you do that daily? A. I do that daily on any—

Q. What time did you pass over this switch point at (162) Rushmore, would you say? A. Eight o'clock then.

Q. Tell the court and jury whether you observed anything relative to the condition, relative to any improper condition of the rails or roadbed or the ties or the track or anything at this switch point when you went over it at eight o'clock, Mr. Barry? A. When I went over at eight o'clock, I found the switch in good condition, the ties and all.

Q. When was the last time that any train passed over that switch point before ten A. M. on the morning of the 29th? A. Well, that train went ahead of my time, before I went to work.

Q. What kind of train was it? A. 91.

Q. What is 91, the jury— A. That is a freight train that runs over there, 91 and 97. This 91 went ahead of 97. I got to work at 7:30. She went in ahead of me.

Q. What type train was 91? A. I couldn't tell.

Q. Was it a freight train? A. Yes.

Q. Which way was it going, west? The same way the train involved in this accident? A. Yes.

Q. What time did the train 91 go west before this one? A. I couldn't tell what time she went.

The Court: Q. About what time?

Mr. Kelly: Q. About what time? A. I imagine, seven A. M.

Q. 7 A. M.? A. Yes.

Q. You went through the switch point at eight A. M.? A. I did.

Q. And this train wreck occurred about ten A. M.? A. Yes, sir.

(163) Mr. Kelly: That is all. You may inquire.

#### CROSS EXAMINATION by Mr. Hatch.

Mr. Hatch: Q. Mr. Barry, Vaughnsville is where you got on the motortruck? A. Yes, sir.

Q. Motor car. And that is about six miles east? A. Yes, sir.

Q. And what time did you start out from Vaughnsville? A. Seven-thirty.

Q. What time did you get in to Delphos? A. Around nine o'clock.

Q. About eight? A. About nine.

Q. An hour and one-half? A. Yes.

Q. All right. Now, when you go on these trips, what do you do about inspecting the—you don't get off the car? A. You run slow enough to inspect. That is my duty.

Q. But you don't get off the car? A. No, sir.

Q. You didn't get off that morning and look at the beet switch? A. Went five miles an hour through there.

Q. Yes. All right. Now, this motor car, how many wheels does it have? A. Four.

Q. It doesn't have any pony trucks, does it? A. No.  
Mr. Hatch: That is all.

Mr. Kelly: That is all, Mr. Barry. Step down.

And thereupon, in order to further maintain the issues upon its part to be maintained, the defendant called as a witness one (164) ARTHUR WEBSTER GABLE, who, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Kelly.

Q. Will you state your full name, please? A. Arthur Webster Gable.

Q. Where do you live? A. 239 East Park Boulevard.

Q. Here in Akron, Ohio? A. Yes.

Q. How old are you? A. Forty-eight.

Q. For whom do you work? A. AC&Y Railroad.

Q. How long have you worked for the AC&Y Railroad? A. Twenty-five years.

Q. Still active? A. Yes, sir.

Q. What kind of work do you do? A. Engine service.

Q. How long have you been in engine service? A. All that time.

Q. Twenty-five years? A. Yes, sir.

Q. And where have you worked generally during that period of time? A. Yard and road both.

Q. And where's the main yard of the AC&Y Railroad located, Mr. Gable? A. Akron, Brittain.

Q. That is out in the east part of Akron, is it not? A. Yes.

The Court: Q. Around Brittain Road somewhere?  
A. Yes, out East Market Street stop.

Q. And where is the western termini of this railroad? A. Delphos.

Q. How far is it from Akron to Delphos by railroad along the AC&Y track? A. One hundred sixty-seven mile.

(165) Q. That track runs in a generally easterly and westerly direction, main track, is that right? A. Yes, sir.

Q. Now, Mr. Gable, I believe you were engineman on Engine 404 that was involved in a derailment May 29th, 1944 at Rushmore, Ohio, were you not? A. Yes, sir.

Q. At what time did your train leave Akron that morning? A. As near as I can recollect, three o'clock.

Q. A. M.? A. Yes, sir.

Q. Where were you going? A. Delphos.

Q. Was that a scheduled freight run? A. Yes, sir.

Q. Your train crew consisted of how many? A. Five.

Q. What were their—what were their designations for the benefit of the jury? A. Conductor, two brakemen, fireman and myself.

Q. I believe Mr. Dice was your fireman? A. Yes, sir.

Q. Who was your conductor? A. Mr. Moore.

Q. What kind of train did you have there that morning at the time of this accident? A. At the time of the accident, that is, as far as I know—I don't know just what is in a car, certain amount of steel and the likes of that.

Q. Do you know how many cars you had on your train? A. As I recall, thirteen.

Q. Including a caboose? A. I couldn't say.

Q. You always carry a caboose on a main line run, do you not? A. Oh, yes.

Q. Now, this derailment occurred about what time in the morning? A. About 10:10 or 10:08, around there.

Q. Now, the engine that was involved was Engine 404, (166) wasn't it? A. Yes.

Q. Can you describe generally what the type of the engine was, so the jury can get some idea? A. It is classed as a Mikado type engine, also called Class R, the class they specify on different roads.

Q. Now, that was a steam locomotive, was it not? A. Yes.

Q. What kind of stoker did it have on it? A. Standard.

Q. Well, what do you mean by standard? A. Well, there are two or three types of stokers. This is the type that the brand name or trade-name is Standard Stoker.

Q. An automatic stoker? A. Yes.

Q. How did this particular type stoker operate? A. It operates the same as your gasoline engine, only operated by steam. Your engine is almost the same style as an automobile engine, only operated by steam.

Q. What kind of fuel was used on this locomotive? A. Coal.

Q. How does the coal get into the firepot? A. It is drawn in technically like an auger or a bit in a firebox.

Q. Do you know about how old this engine was; how long it had been in service? A. It hadn't been in service over three years, I don't imagine. I don't know the exact time.

Q. Had you on previous occasions operated this engine? A. I have.

Q. And was this engine used in connection with freight run work, Mr. Gable? A. Yes, sir.

Q. It wasn't used in yard work? A. Oh, might occasionally, I don't know about that.

Q. Were you entirely familiar with the method of operation (167) of this particular engine? A. Yes, sir.

Q. What was the condition of the weather? A. Clear..

Q. What was the condition of the rail? A. The rail was all right as much as I could observe.

Q. Whether wet or dry? A. Dry rail.

Q. I believe the track at this location is straight for some two miles? A. Yes, sir.

Q. Any curves in the track? A. No, sir.

Q. What is the grade of the track? A. Level.

Q. Level? Now, what side of the engine were you riding on? A. The right side.

Q. That would be the north side, would it not? A. That is right.

Q. Whereabouts on the engine were you riding? A. I was riding on the right side, on the seat box behind the throttle, behind the boiler.

Q. Is that what is known as the cab? A. That is right.

Q. What was the over-all length of that engine, would you say, Mr. Gable? A. Over-all length, I couldn't state right now offhand.

Q. Now, Mr. Gable, what was the last stop that you made before arriving at Rushmore that morning? A. At Columbus Grove.

Q. How far east of Rushmore is Columbus Grove? A. East of Rushmore?

Q. Yes. A. I would say about ten mile, eight or ten mile.

The Court: (To jury) Can you hear him?

Mr. Kelly: Q. Now, this derailment occurred at or near (168) the switch point at Rushmore, did it not? A. Yes, sir.

Q. About how fast was this train traveling as you approached the switch point, Mr. Gable? A. Between thirty and thirty-five miles an hour.

Q. Was this out in the open country? A. Yes, sir.

Q. Now, I want you to tell this court and this jury in your own words just what happened as far as you observed, and you know about it, Mr. Gable. You go ahead, tell in your own way. A. As near as I—

Q. Keep your voice up. A. Approaching a whistling point, blew a first blast of the whistle. Of course, naturally, the noise is so intense you can't hear anything else, but when I released the whistle there I observed a peculiar noise and I figured was something wrong with either the cars or locomotive, I wouldn't say which. I immediately applied the air, made emergency operation.

Q. What happened? A. Had a wreck.

Q. What happened to you? A. Well, I was thrown around quite a bit.

Q. You were hurt in this accident, of course? A. Yes, sir.

Q. When everything came to a standstill, Mr. Gable, —the engine was overturned on its side, was it not? A. That is right.

Q. Which side of the track? A. On the south side as near as I can recollect or in the center, I wouldn't say how—

Q. You were still in the cab? A. Yes, sir.

Q. Mr. Gable, will you tell this court and this jury (169) whether you know of anything which caused this derailment there that morning? A. No. I couldn't state definitely what it was. All I know, I just went through the procedure which I did and after everything was over, why there was too much to—that tore up, I don't imagine you could locate anything.

Q. As far as you know did anything break on that engine or any part of that train before the derailment?

A. After it was over there was quite a bit—

Q. I mean, before. A. I don't know before.

Q. Where was the front of the locomotive in respect to the time that you heard some noise which attracted your attention? A. Approaching this switch or frog.

Q. Were you up to the switch point? A. Not quite.

Q. Of course, when you got there, that is when things happened? A. That is right.

Q. Now, tell the court and jury whether the engine left the rail at the switch point or at the frog, if you know? A. Well, it definitely left at the frog. I don't know about the switch. I couldn't state that; I didn't observe what was ahead of the engine.

Q. You said you made an emergency stop? Please state what you did. A. An emergency stop is you apply the air, give your brake a full pressure on the wheels, get stopped as quick as you can. That is as brief as I can make it.

Q. Had you ever been involved previously in an accident of this character, Mr. Gable? A. Not directly, no.

Q. Had you ever been involved in an accident at this particular location or point? A. No, sir.

(170) Q. Do you know of anything that could have been done by you to have prevented this derailment? A. I do not.

Q. Now, do you know the cause of this derailment personally? A. No. Personally I don't know the cause.

Mr. Kelly: That is all.—You may inquire.—Wait, he wants to ask some questions.

CROSS EXAMINATION by Mr. Hatch.

Mr. Hatch: Q. Just a moment. How far is that whistling post from the beet switch? A. Why, I couldn't say. It is right in that vicinity. I wouldn't say just how many feet, anything like that. It is right—

Q. You were on the righthand side of the cab, were you not, Mr. Gable? A. Yes.

Q. You weren't watching that particular switch, were you? A. I observe the track more by the whistling post and all.

Q. All right. If you know, what did you do, pull the string or chain? A. An air whistle.

Q. What did you do? A. Operate a little valve with your thumb that applies the air to your whistle valve on top of the engine. Opens the whistle.

Q. After you let off that valve, what did you do—Did you hear—to make the whistle work, what did you hear? A. A peculiar noise.

Q. A loud noise? A. Yes. One of them noises that you pick up in this kind of work that—

Q. Was it a familiar noise then? A. Oh, no.

Mr. Kelly: Q. Well, just—

(171) Q. And had Dice,—Dice was on your left then, was he not? A. Yes, sir.

Q. Had he said anything or yelled to call your attention to it? A. No. He didn't mention anything to me. I didn't mention anything to him.

Q. But there wasn't anything on the track? It didn't sound like you had hit anything, object on the track, like a wagon, anything? A. No.

Q. Do you know, this locomotive had some engine trucks or pony trucks, did it not? A. Yes, sir. They all do. All—they all has that—pony trucks.

Mr. Kelly: Q. Keep your voice up.

Mr. Hatch: Yes. This jury has to hear.

A. Two—

Q. Two? A. Two wheels.

Q. Now, earlier that day had you noticed a peculiar noise? A. No.

Q. Around the pony trucks? A. No.

Q. Isn't it a fact that you stopped one time and got out and looked at the pony trucks? A. I did not look at no pony truck.

Q. Didn't you stop? A. I stopped at a grade crossing, a grade switch, one particular place I stopped at.

Q. One particular place you stopped at? A. Yes.

Q. At a grade crossing? A. Yes, sir.

Q. Well, now, as a matter of fact, you stopped there because you heard some peculiar noise, didn't you? A. No. Because the man in the inner blocking plate held the semaphore or block against us. You couldn't cross.

(172) Q. That morning sometime didn't you hear some noise and go out and inspect the engine? A. Not that I recall, no. As we pull up some of those places it is common practice to walk around the engine, get back on again.

Q. Some place you weren't scheduled to stop?

The Court: Q. Did you have a signal to stop? A. Yes. We have a derail there. If you don't stop you go off the track.

Mr. Hatch: Q. Where was that? A. Greenwich.

Q. You stopped because there was— A. There was a red board. B&O crosses there. We have to stop if we do not get the signal to cross over.

The Court: Q. In other words, if you didn't stop you might have had a collision with the B&O? A. Yes.

Mr. Hatch: Q. That would have been a collision not a derailment? A. Well, but one way or the other.

Q. That is like the traffic light at a corner? A. Yes. That is right.

Q. There wasn't any actual derailment at Greenwich, was there? A. No, sir.

Q. Do you know what the bolster pin on the pony truck is? A. Bolster pin?

Q. Is there a pin on there? A. There is a pin there.

Q. What do you call that pin? A. An engine-truck center pin.

Q. All right, the center pin. What does the engine truck center pin;—what is the purpose of that pin? A. Well, attached to the engine, to hold them, the pony trucks.

Q. That center pin holds the pony trucks on, is that (173) right? A. Well, it wouldn't exactly hold them on. It—the way it is constructed, it gives. As you go around the curve, it slues.

Q. It permits the pony truck to go one way or the other? A. To guide the engine around the curve whichever—

Q. You know that center pin was broken, do you not, afterwards? A. I don't know anything about that. I don't recall that. Nothing was said to me about it.

Q. Didn't you get out and look at that prior to getting to Rushmore that morning? A. We look—the engine over, before we leave our terminal for that matter.

Q. Didn't you look at the center pin? A. Sure. Looked the engine over.

Q. When was the last time before you got to Rushmore that you looked at that center pin? A. The Grove, the last stop.

Q. The Grove? A. Yes, sir.

Q. How far is that? A. About eight or ten mile from where it happened, whatever the mileage is. I would have to look at the time card.

Q. How much track was torn up? A. I do not know.

Q. Was it about six hundred yards—wasn't it? A. I do not know. After I come out of it, I left, went and had medical attention. I wasn't there after.

Q. You went with Mr. Dice over to Delphos to the doctors? A. Yes.

Q. Is that right? A. Yes.

(174)

RE-DIRECT EXAMINATION by Mr. Kelly.

Q. Mr. Gable, just a minute. I want to clear up something. I believe you said before you left Akron you looked over this engine? A. That is right.

Q. Is that a customary thing to do? A. It is.

Q. When you look over an engine, what kind of inspection do you make at the beginning of your run such as you made this particular morning? A. Well, you

examine the rods and driving wheels, and your bolts, nuts, pins, one thing and another. That is all it is made up of.

Q. Now, did you do that that morning? A. I did.

Q. Did you observe anything defective at all about this locomotive in your check-up, on your examination?

A. No, sir, not at that time.

Q. Now, what is the fact as to whether or not when you make stops for any duration that you yourself check up the condition of the locomotive? A. That is right.

Q. Did you do that on this particular morning? A. That is right. The times I had a chance to, I did. Yes, sir.

Q. Is that what you did at Columbus Grove, or you said, the Grove? A. That is right.

Q. Did you mean Columbus Grove? A. That is right.

Q. Is that what you did at Columbus Grove? A. That is right.

Q. Did you observe anything defective about the engine at Columbus Grove? A. No, sir. If I did I wouldn't have went any further.

Q. You are charged with responsibility for operating (175) that engine? A. That is right.

Mr. Hatch: I object. Ask the last part go out.

The Court: Well, that would be a fact.

Mr. Kelly: Q. Are you charged with responsibility or maintenance of that engine when it is out on the road under your care as an engineman? A. Yes, sir.

Q. As an engineman, if you found anything wrong with that engine, would you have the right to refuse to continue on to operate that engine, Mr. Gable? A. I would.

Q. Now, let me ask you this: I assume from what you have said that there is a certain constant noise surrounding the running of a railroad locomotive? A. Yes, sir.

Q. And you are familiar with those sounds and noises, are you? A. That is right. Just from the way the wear of the engine, how long it had been in service, the uses and likes of that.

Q. Because of your experience and knowledge, could you detect anything unusual insofar as noise or sounds were concerned? A. Not up to that time.

Q. That is what I mean. A. Yes.

Q. But as soon as you detected an unusual noise or sound, that is when you applied the emergency? A. That is right.

Q. Do you know what made that unusual sound, noise, something out of the ordinary, Mr. Gable? A. No, I do not.

Mr. Kelly: That is all.

Q. Let me ask,— Would it be comparable to running an automobile and detecting something unusual about the operation (176) of your automobile? Would that be a fair comparison to make, Mr. Gable? A. It would. Only you would have to compare the motor of an automobile to the wheels of a locomotive.

Q. In other words, an engine has its own peculiar sounds the same as an automobile? A. That is right.

Mr. Kelly: That is all.

#### RE-CROSS EXAMINATION by Mr. Hatch.

Q. Mr. Gable, I think you stated you don't know what caused this derailment? A. No, sir.

Mr. Hatch: That is all.

Mr. Kelly: That is all.

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RECESS.

And thereupon, in order to maintain the issues upon its part to be maintained, the defendant called as a witness one SIGMOND EDMOND DOWELL who, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Kelly.

The Court: Q. Are you a little deaf? A. Yes, sir.

Mr. Kelly: Q. Mr. Dowell, can you hear me? A. Yes, sir.

Q. Will you state your full name, please? A. Sigmond Edmond Dowell.

Q. Where do you live? A. North Hill, 76 West Dalton.

Q. How old are you? A. Sixty-seven.

Q. Where do you work? A. AC&Y Railroad.

Q. How long have you worked for that Company?

A. Started (177) in February '20.

Q. Are you still engaged in active work? A. Yes, sir.

Q. What kind of work do you do, Mr. Dowell? A. Boiler maker.

The Court: Q. What? A. Boiler maker.

Mr. Kelly: Q. Boiler maker? A. That is right.

Q. That is the trade? What do you do in respect to inspecting of railroad locomotives that are used in active service? A. I inspect the tanks, inside tanks, the boilers, inside the boilers and outside.

Q. How long have you been engaged in boiler work?

A. Thirty-two or three years, I guess.

Q. Do you know all about the mechanical operation and mechanical parts of a railroad locomotive that are used? A. The majority of it. There might be some few things I don't.

Q. Now, in the month of May, 1944, were you what is known as a boiler inspector? A. That is right.

Q. What were your duties as a boiler maker? A. I wash out and inspect the boiler.

Q. Now, is it not a fact, Mr. Dowell, that a railroad company is charged with the responsibility under the Federal Law of making a monthly inspection of railroad locomotives that are engaged in active service? A. That is right.

Q. That has been, as you know, the law for many, many years, is that right? A. That is right.

Q. Now, tell the court and jury whether an inspection of Engine 404 was made in the month of May, 1944?

A. Well, there was.

(178) Q. And who made that inspection? A. I did.

Q. And who, if anyone, assisted you? A. Well, one.

Q. Who helped you, if anybody? A. I had help.

Q. Who was a helper? A. Henry Stevens.

Q. Mr. Stevens? Now, that inspection consisted of what? What did you do in that inspection? A. I look over all the boiler, the firebox, outside the locomotive.

The Court: Can you hear that? I can't.

Mr. Kelly: Q. Can you keep your voice up? A. Yes, sir.

Q. Mr. Dowell, please,—where was that inspection made? A. AC&Y Roundhouse.

Q. Where? A. Brittain Yard.

Q. And was it made on a pit? The engine— A. Yes, it was on a pit.

Q. What do you mean by round pit, where this— A. There is a track pit. You can go underneath, inspect machinery underneath.

Q. When was the monthly inspection made on Engine 404 for the month of May, 1944? A. Well, I had it here in my pocket.

Q. All right. Turn to your records, if you wish. A. May the 4th, 1944.

Q. May 4th? A. 25th.

Q. May 25th? A. May 25th, 1944.

Q. Now, about how long in point of time was consumed in making that monthly inspection of that particular engine, Mister— A. Well, I would say probably forty-five minutes, that is, to inspect.

(179) Q. That is right. Now, in this inspection did you go over the entire locomotive? A. Oh, yes. That is, outside and inside.

Q. That is right. Now, following that inspection did you fill out a form of the inspection? A. Not—only the fact.

Q. That is what I mean. Did you fill out a form of your inspection, Mr. Dowell? A. Well, I don't fill this out. Kirk fills this out. I sign.

Q. 38. Mr. Dowell, is this your written inspection and repair report for your inspection of locomotive 404 for the month of May, 1944? A. That is right.

Q. Was that prepared and signed by you at that time? A. Yes, sir.

Mr. Hatch: Object. He said it was prepared by someone else.

A. Well, machinist and boiler maker. This is machine part and boiler maker and machinist makes inspection at the same time.

Mr. Kelly: Q. Now, is this—is this the form of report, one that is required to be kept by the Company under the Federal laws of the United States? A. Yes.

Q. And do you know what is done with the original of this report? A. Well, keep it on file.

Q. No. The original? A. Well, send that to the State.

Q. You mean, the United States, don't you? The Interstate Commerce Commission. That is where the original goes, is that right? A. Yes.

(180) Q. Is this the copy which the Company keeps? A. That is right.

Q. And was that signed by you on or about the—  
A. 25th, May 25th.

Q. —May 25th of 1944? A. That is right.

Q. And before the last few days have you seen this since that time? A. No, I don't believe I have. I haven't seen this since that time.

Q. You were asked to produce it? A. Told me today to bring it down.

Q. All right. Now, you tell this Court and this jury whether you found any defect, anything improper about this locomotive at the time of this inspection on May 25, 1944? A. No, I did not.

Mr. Hatch: Object. Just a minute. Object to the form, because he said he inspected the boiler and fire box only.

The Court: Well, he can tell whether he found anything. You have a right to cross-examine.

Mr. Hatch: If he limits it to what he inspected.

The Court: You have a right to cross-examine.

Mr. Hatch: I object.

The Court: Q. You may answer.

Mr. Hatch: Except.

The Court: Q. The question was whether you found anything wrong with this locomotive on that date?

Mr. Kelly: Q. Did you hear the question? A. I did not.

Mr. Kelly: Q. Well, did you insofar as your inspection was concerned approve of this locomotive for road work? A. It is absolutely O.K.

(181) Mr. Kelly: That is all. You may inquire.

#### CROSS EXAMINATION by Mr. Hatch.

Q. Mr. Dowell, as I understood you, you limit your inspection to the boiler and the fire box, is that correct?

A. Well, I inspect the boiler all over.

Q. And the firebox? A. Sure. And the firebox.

Q. You didn't inspect the center pin of the pony truck, did you? A. No, that don't belong to me.

Q. All right. You didn't inspect it on the 29th, did you? A. No, sir.

Mr. Hatch: That is all.

Mr. Kelly: That is all. You may step down.

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—And thereupon, in order to further maintain the issues upon its part to be maintained, the defendant called as a witness one WILLIAM FRANCIS GEORGE, who, being first duly sworn, testified as follows:

## DIRECT EXAMINATION by Mr. Kelly.

Q. Will you state your full name, please? A. William Francis George.

Q. Speak up so we all can hear. A. William Francis George.

Q. Where do you live? A. R. D. 2, Box 226, East Akron.

Q. How old are you? A. Forty.

Q. Where are you employed? A. AC&Y Railroad.

Q. How long have you worked for that Company?  
A. Started in 1924.

(182) Q. Have you worked continuously? A. Yes, sir.

Q. Still work for the Company? A. Yes, sir.

Q. What kind of work do you do? A. Machinist.

Q. How long have you been a machinist? A. Forty-two.

Q. What kind of work were you doing in the month of May, 1944? A. Federal inspection.

Q. What do you mean by Federal inspection? Explain so we will understand. A. Inspect the locomotive all over.

Q. And you know as a matter of fact that every railroad company which has an engine in active road service is required to have a monthly inspection, does it not?

Mr. Hatch: Object.

A. Every thirty days, yes.

Mr. Kelly: Is there any question about the law on that, Mr. Hatch? If there is, I will produce it.

Mr. Hatch: No.

Mr. Kelly: Do you question that statement?

Mr. Hatch: No. I don't question it. I still object.

The Court: It may stand.

Mr. Kelly: All right.

Q. Now, are you generally familiar with Engine 404 of the AC&Y Railroad, Mr. George? A. About the same.

Q. About all the same? Now, I hand you what is identified as Defendant's Exhibit 38, and ask you whether you participated in an inspection of Engine 404 during the month of May, 1944? A. Yes, sir.

Q. What is your answer? A. Yes, sir.

Q. And what did your inspection consist of? A. Well, inspect locomotive all over, underneath and all the mechanical (183) parts.

Q. Now, what embraces the running gear—or, rather, what embraced the running gear? A. What embraces?

Q. What constitutes the running gear of an engine?

A. The wheels and side rods.

The Court: Q. What?

A. Reverse gear.

The Court: Q. Reverse gear. What else? Anything else? A. Mechanical—your brakes, all of it.

Mr. Kelly: Q. Did you personally inspect the running gear and the rods and the brakes of this engine on the 29th—25th of May, 1944? A. Yes, sir.

Q. And what did you observe their condition to be at that time? A. In good condition.

Q. And this,—directing your attention to Defendant's Exhibit 38, did you sign this inspection report on or about that date? A. Yes, sir, I did.

Q. Does your signature appear there? A. Yes, sir.

Q. Have you seen this document since that date, other than here in the courtroom? A. The first I have seen, this morning.

Q. What did you say as to whether or not your inspection you made there at that time was made in conformity to Federal law? A. That is right.

Q. Sir? A. That is right.

Q. Did you by your inspection observe or discover any defects of any kind in respect to Locomotive 404?

A. No, sir, I didn't.

(184) Q. And did you yourself approve of this locomotive for active road work following that inspection?

A. Yes, sir.

Q. Is that the approval indicated by your exhibit here? A. That is the approval, yes.

Q. Do you know what became of the original of this report? A. No, sir, I don't.

Q. What is the fact, as to whether or not you as a railroad inspector carry on your duties in keeping with a Manual or a Code that is promulgated by the Interstate Commerce Commission in respect to inspection? Put it this way—Does the Interstate Commerce Commission prescribe certain standards for the maintenance of locomotives? A. Oh, I guess—Yes, they do.

Q. Yes. I think I asked you if this was your signature? A. Yes, sir.

Mr. Kelly: That is all. You may inquire.

#### CROSS EXAMINATION by Mr. Hatch.

Q. Now, this report doesn't cover the pony truck, does it? A. That covers a locomotive.

Q. Where in this report? A. Well, the Federal inspection is supposed to inspect the locomotive all over.

Q. Where in that report is it? A. I don't know.

Q. Your answer is you don't know?

Mr. Kelly: No, he hasn't said that. No. No.

The Court: I didn't hear him say anything.

Mr. Hatch: I did. He didn't say it very loud.

Q. Do you know? A. What do you mean?

Mr. Kelly: Inspect the pony truck.

Mr. Hatch: Q. Where on this report is there any reference (185) to the pony trucks? A. It isn't on there.

Q. It isn't on?

Mr. Kelly: That is right.

Mr. Hatch: Q. Did you inspect this mechanical part of this locomotive 404 after the 25th? A. No. I don't believe I did.

Mr. Hatch: All right. That is all.

#### RE-DIRECT EXAMINATION by Mr. Kelly:

Q. Mr. George, under the inspection— A. After this inspection here?

Q. Yes. Does the pony truck come within the category? A. Let's see? Yes.

Q. Does it not? A. Yes.

Q. —that is set up on this report? What did your inspection reveal as to condition of this running gear of this engine May 25, 1944? A. In good condition.

Mr. Kelly: That is all.

#### RE-CROSS EXAMINATION by Mr. Hatch.

Q. Mr. George, you have been out on the road, have you not? A. Well, a little. Not very much.

Q. Do you know what makes the wheels cut the rails? A. Well, sharp flanges, probably, frogs.

Q. Did you have any report on—Did anybody report to you that you know of that this engine was cutting the rails? A. I don't remember.

Mr. Hatch? All right. That is all.

RE-DIRECT EXAMINATION by Mr. Kelly.

Q. Mr. George, the pony truck on this locomotive consisted (186) of two wheels, did it not? A. That is right.

Q. Were those wheels equipped with flanges? A. Yes, sir. That is the leading part of this wheel, laid on the rail.

Q. Which side of the flange on? A. Inside the rail.

Q. What is a flange called? Describe more in detail so that the jury may understand. A. Oh, a flange on the inside of the wheels, sticks down about an inch on the inside of your wheels.

Q. In other words, kind of a rim around the inside of a wheel, is that right? A. That is right.

Q. It is metal? A. It is metal.

Mr. Kelly: That is all.

And thereupon, in order to further maintain the issues upon its part to be maintained, the defendant called as a witness one CHARLES EDWARD MOORE, who, being first duly sworn according to law, testified as follows:

DIRECT EXAMINATION by Mr. Kelly.

Q. Will you state your name, please? A. Charles Edward Moore.

Q. Where do you live, Mr. Moore? A. Delphos, Ohio.

Q. How old are you? A. Forty-nine.

Q. By whom are you employed? A. AC&Y Railroad.

Q. How long have you worked for that Company?  
A. Twenty-seven years.

Q. What kind of work do you do? A. Train conductor.

Q. How long have you been a train conductor? A. Twenty-four (187) years.

Q. What kind of work were you doing in the month of May, 1944? A. Conductor.

Q. Well, generally, what were your duties as a conductor? A. Well, you make out reports for the train.

Q. Keep your voice up, please? A. You have—see that the members of your crew performs their duties, conduct the train from one terminal to another.

Q. Are you in charge of the train, as such, when you are a conductor, Mr. Moore? A. Yes, sir.

Q. I believe you were conductor on the train involved in this accident, 29th of May, 1944, at Rushmore, were you not? A. Yes, sir.

Q. Where were you riding at the time of this accident? A. In the caboose.

Q. How many cars did you have that morning? A. A. Ten.

Q. Ten? Does that include the caboose? A. Yes.

Q. Were those— A. Nine loads and the caboose is classed as an empty.

Q. All right. What was the first thing you noticed out of the ordinary? A. Well, the caboose started to come to a sudden stop.

Q. That indicated what to you?

Mr. Hatch: Object.

The Court: He may answer what that would mean.

A. Well, I knew there was something wrong with the train.

Mr. Kelly: Q. All right.

The Court: Q. Would that mean the exercise of the brakes? A. Yes. I felt the air going on.

(188) Mr. Kelly: Could you tell what kind of an application of brakes was being made, Mr. Moore? A. Yes, sir.

Q. What kind was being made? A. An emergency application.

Q. Was that sudden? A. That is sudden.

Q. Was there anything to indicate to you before the application of the brakes that those brakes were going to be applied? A. No, sir.

Q. Did the caboose remain intact on the track? A. Yes, sir.

Q. What did you do after the caboose came to a stop? A. Well, we run on ahead to see what happened. We could see the engine was derailed. We run on to see if anyone was under the engine or something, get them out of there.

Q. Who was riding with you? A. Two brakemen and a dead-head brakeman.

The Court: Q. What is a dead-head brakeman? A. Well—

The Court: Q. A fellow that is going back somewhere? A. Yes.

The Court: Q. He is just riding along? A. Yes.

The Court: Q. Going back? A. Going over to work, to come out of Delphos.

The Court: Q. I see.—That is a nice expression.

Mr. Kelly: Q. Now when you—You went up to the head end of that train, is that right? A. That is right.

Q. I believe, you found this engine derailed? A. Yes, sir.

Q. When you got up there was Mr. Dice out of the cab? A. Yes, sir.

(189) Q. Was Mr. Gaba out of the cab? A. Yes, sir.

Q. How long did you stay around there that day, Mr. Moore? A. After the derailment?

Q. Yes. A. Oh, thirty or forty minutes.

Q. Then where did you go? A. Why, the agent from Delphos drove out in his automobile, took us in to Delphos.

Q. Did you go and have a physical check-up yourself? A. No, sir.

Q. What did you go in to Delphos for? A. Because I went home.

Q. I see. You lived out there? You were not charged with responsibility of clearing up the wreck, anything like that? A. Oh, no.

Q. Now, before you left the scene of the accident, did you look—I will put it this way, do you know there is a switch track on the south side of the main track, known as the beet track? A. The beet track, yes.

Q. There is a switch point at the juncture of the switch track and main track, isn't there? A. Yes, sir.

Q. Now, did you look at the track, the main track east of the switch point? A. Well, I don't think I did. I don't remember it fully.

Q. Did you look at the switch points? A. Yes.

Q. Now, I want you to tell this court and this jury whether there were any marks or any damage at all to that switch point? A. No, sir. That switch point was in good condition.

Q. What was the condition of the rails at the switchpoint (190) in respect to being lined up for westbound traffic on the main track when you looked at it? A. Well, as far as I remember was O.K.

Q. In other words, put it this way,—Would this be a fair statement, the switch was properly lined when you saw it after this accident for westbound traffic? A. Yes.

Mr. Hatch: Object to the question.

The Court: It may stand.

Mr. Kelly: Q. What was the condition of the switchstand after this accident as you saw it? A. O.K.

Q. Was it damaged? A. No.

Q. Did you observe any marks of any kind on the rails or ties or track at the switch point? A. No. There was no marks there.

Q. Did you observe that the track was torn up a distance west of the switchpoint? A. Yes, the track was torn up west of the switch.

Q. But was it torn up east of the switch? A. No.

Q. Was it torn up at the switch? A. No.

Mr. Kelly: That is all. You may inquire.

#### CROSS EXAMINATION by Mr. Hatch.

Q. Well, the switch was torn up, was it not? A.

—No, the switch—

Q. Well, the tracks were torn up? A. About a distance of fifty or sixty feet west of there the track was torn up.

Q. On the beet switch? A. No, not at the switch, no. At the frog is where the track starts to be taken out of line.

Q. You are talking about the main track? A. Yes.

(191) Q. In other words, the beet switch wasn't torn up at all? A. No. I didn't notice that beet track torn up only where the engine laid, where it went across from the main track.

Q. You mean to tell this jury that there were no markings on—on any of those rails? A. Oh, yes.

Mr. Kelly: Oh, object.

Mr. Hatch: Q. What did you say that—

Mr. Kelly: I beg to differ with you.

Mr. Hatch: You may differ. You have all along.

A. You say, at the switch?

Mr. Kelly: Yes.

Mr. Hatch: Q. On the tracks. A. Yes. There was marks all over the tracks west of the switch from the frog in:

Q. But you said there were none on the switch then, is that right? A. That is right.

Q. Were any of the cars, boxcars or gondolas, were any of those damaged at all? A. Yes, in the head ones, was derailed, five badly damaged.

Q. I hand you Plaintiff's Exhibit 2, on that photograph there, can you tell us which is the main track and which is the switch? A. This engine is laying right on the beet track, the main sets over further.

Q. Now, on here I can see some rail, it looks like it is curled, right here. A. That is probably the track tore up.

Q. Is that the beet switch track or main track? A. I can't tell by this picture.

(192) Q. As you remember that day, was any of the rail curled up that way? A. The main track, yes. The main track was all curled up, tore out.

Q. Now, looking at that picture, the box cars were down to the right as you look at this picture, were they not, that the engine was facing? A. East.

Q. East? A. Headed east after it came to rest, yes.

Q. Now, where would you say that switch is with reference— A. To that engine?

Q. To the picture of this engine. A. Well, I will say three hundred feet.

Q. Three hundred feet? A. I imagine. Pretty close to three hundred feet to the switchstand.

Q. To the switchstand? A. Yes.

Q. Is that the— A. That is the stand that operates the switch.

Q. That is where they have red and green? A. Yes. Red and green banners.

Q. From your examination that morning of the derailment, you don't know now, or not, what caused the derailment of that car? A. I do not know. No, sir.

Mr. Hatch: That is all.

Mr. Kelly: That is all, Mr. Moore.

Mr. Kelly: Shall we proceed, Your Honor? I have a number of witnesses here. It will take sometime for the next one.

The Court: More than fifteen minutes?

(193) Mr. Kelly: Yes, I would say so.

The Court: All right, then, we will adjourn.

And thereupon after the usual admonition by the Court to the jury, Court adjourned until one-fifteen P. M., on said day, at which time Court having convened pursuant to adjournment, the trial of said case proceeded as follows:

P. M. Session, October 17, 1949.

And thereupon, in order to further maintain the issues upon its part to be maintained, the defendant called as a witness one F. FAIRFAX LENTZ, who, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Kelly.

Q. Will you state your full name, please? A. Frederick Fairfax Lentz.

Q. How do you spell your last name? A. L-e-n-t-z.

Q. Where do you live, Mr. Lentz? A. Akron, Ohio and Mogadore, Ohio.

Q. How old are you? A. Forty-eight.

Q. And who do you work for? A. AC&Y Railroad.

Q. How long have you worked for that Company?

A. Twenty-three years.

Q. What kind of work do you do? A. Superintendent.

Q. And what are your general duties as superintendent? A. I have charge of train and operation, yard operations.

Q. Are you immediately in charge of train crews, Mr. Lentz? A. Yes, sir.

Q. What kind of work were you doing in the month of May, 1944? A. Superintendent.

(194) Q. Were you in charge of crews at that time? A. Yes, sir.

Q. What did you have to do with respect to the maintenance and operation of trains and train equipment? A. Well, of course, my duties were confined entirely to train operations; clearing the—on that date, on clearing, keeping trains in operation, seeing crews were called at the proper time.

Q. Now, you recall that on the 29th of May, 1944, there was a derailment of a train at Rushmore, was there not? A. Yes, sir.

Q. What time did you receive word of that derailment? A. Possibly thirty minutes to an hour after it occurred.

Q. Where were you when you received that notice? A. I don't—

Q. I mean, were you in Akron? A. I was in Akron, yes.

Q. And that involved a freight train, did it not?

A. Yes, sir.

Q. Was that a scheduled freight train, Mr. Lentz?

A. It was.

Q. What is meant by a term scheduled freight train? Explain. A. A scheduled freight train is a train that is listed in the timetable schedule.

Q. It operates daily, is that right? A. That depends. It may operate daily except Sunday.

Q. Back in those days, war times, you were running full capacity, I take it, is that right? A. That is right. This train was operating daily.

Q. Now, did you go out to Rushmore? A. Yes, sir.

(195) Q. How did you get out there? A. As I recall, I went out by automobile.

Q. When you got out there, what did you find in respect to the condition of the train or the cars on the train? A. I found an engine derailed, a locomotive derailed, on its side, and the cars derailed. I believe there was five cars behind the locomotive derailed.

Q. What did you do by way of clearing up the situation at that time, just generally speaking? A. Well, of course, we had the wreck train called before

leaving Akron and had the Pennsylvania wreck train called from Ft. Wayne, Indiana, to assist us.

Q. Now, Mr. Lentz, were you in charge of the over all operation of the clearing up the damage, of the situation there by way of getting the wrecked cars out and back into the shops, and getting equipment away from there? A. I was.

Q. You were boss of that over all job, were you? A. That is right.

Q. You were out there how long, a day or so or what? A. I believe I was out there three or four days.

Q. Now, when you got out there that day about what time was it, would you say? A. I believe it was around five o'clock in the evening, four o'clock. Sometime in the afternoon.

Q. Now, before we proceed further, I want you to take a piece of chalk and show us how good an artist you are by drawing what is known as a switch-point, so that the jury will know what we are talking about. (Witness drawing on board.)

Q. Now, make the top—For the purpose of our drawing, (196) the top of the board would be north, and the right side would be east, and the left side would be west and the bottom would be south. A. That would be north.

Q. That is right. That is the other way. A. We make this—call this a main track here, and this is the switch siding. This is a switch in here. This out in here is the frog. That is known as the frog in there. This is the switch.

Q. Now, put the switchstand in. A. The switchstand sets right in here, possibly, somewhere, have a rod

that control these two tracks pulling over. This sets out like that.

Q. Now, just step aside a minute. At this location there was a switch track leading off of the main track, was there not? A. Yes, sir.

Q. That switch track was on the south side of the main track? A. That is right.

Q. And about how far was the north rail of the switch track south of the south rail of the main track—not at the switch point but the switch track itself? A. I don't exactly get—

Q. About how far were the tracks about not at the point but when they line up together? A. You mean, when they got beyond?

Q. When they got beyond the curve. A. Well, I would say there is possibly fifteen to eighteen, twenty feet between the beet track and the main track.

Q. Now, in order for a train to proceed westerly on that main track what is the fact as to whether or not the points (197) of the easterly rails of the switch itself would be to the south? A. Oh, I can show you on there if you want to know what a train on this track,—you would have to unlock the lock on this switch stand and pull that lever around, and when you pull that lever around that would throw this point out here and throw this point over here.

Q. All right. A. In other words, this is the way this stands normally.

Q. That is right. A. Now, as soon as you throw this switch that would bring this point out here and bring this over against this track so the train could move.

Q. Now, in other words, for a main line movement the rails of the switch track would not be touching the

rails of the main track, would they? A. Well, no. This point here would be touching. This would be.

Q. That is what I mean. That is for the purpose of permitting the flanges of the wheels of the train to proceed uninterruptedly, is that right? A. That is right.

Q. Now, what constitutes the switch point itself? Is it any particular points and area? A. Well, the switch point is about fifteen feet from right here. It is a separate rail, which enlarged might look like that,—comes down to a fine point.

Q. All right. Now, tell this court and this jury whether you observed any damage of any kind to that switch point when you got out there? A. I did not.

Q. Did you observe any damage of any kind to the switch stand that operated that switch? A. I did not.

(198) Q. Mr. Lentz, you have been a railroader how many years? A. Thirty-three years.

Q. Have you operated trains, engines, locomotives? A. Yes, to an extent.

Q. Are you familiar with railroad construction? A. I was previously assistant superintendent of motor car in charge of maintenance of locomotive, also superintendent of one department in charge of car maintenance.

Q. Was there any damage as you observed to the rails east of the switch point? A. There was not.

Q. Was there any damage as you observed to the ties and roadbed or the track east of the switchpoint? A. There was not.

Q. How close is this switch stand to that south rail?

A. Well, I would say it is about four and one-half feet from the rail stand.

Q. Now, you mention a frog. What is a frog? A. A frog is the—this is what we call a frog here.

Q. What is it? Tell us about it. A. Now, when the wheel flange, into that opening down there, an opening in there, down in there. In other words, if a wheel goes in there, if the wheels are leading on this track, it follows a groove in here. If the wheels are in this track it follows a groove in here.

Q. In other words, where the two rails are, they are cut so as to let the flanges move unobstructed. A. Yes.

Q. How far? A. About seventy feet.

Q. The frog is located on the north-rail or south rail? A. It was located on the south.

(199) Q. On the main track? Did you observe the rails of the main track and the north rail of the switch tracks east of the frog? A. Yes, I did.

Q. Now, did they indicate any damage or any marks or anything out of the ordinary? A. The first marks of any—the first marks that we can see—that I could see was on this wing. It looked as though—

Q. Not what it looked like. Just describe what you saw there? A. There was some marks on the wing of that guard rail.

Q. Where was that with respect to the frog? A. That is part of the frog.

Q. That is what I mean. Were there any marks east of the frog on any rail, Mr. Lentz? A. No, there wasn't.

Q. Now, I take it from what you have said—Of course, there were marks west of the frog? A. From the frog on west there were marks.

Q. What was the condition of the track in that location, as you observed? A. Well, the track was damaged.

from there on down probably three to five hundred feet. I would say five hundred feet approximately.

Q. I was going to ask, where did the engine come to a stop with respect to the switch point? A. Possibly five hundred feet east—or west.

Q. West. South of the track headed back east? A. It was partially on the main track and over on its side.

Q. Was there any damage as you observed to the switch track itself immediately west of the switch point?

A. Not (200) immediately west, no.

Q. That is what I meant, Mr. Lentz. Did you personally conduct an investigation there or elsewhere to determine the causes of this derailment? A. Yes, sir.

Q. From your knowledge of the situation and what you saw, and your investigation, can you tell this Court and jury what caused that derailment? A. I cannot.

Q. What is the fact as to whether or not the Company reported to the Interstate Commerce Commission that the cause of this wreck was unknown? A. That is right.

Q. Was your investigation made and reported as required by law? A. That is right.

Q. Maybe I asked you this, whether or not in your inspection did you examine the ties east of the switch point to see whether there were any marks on them of any kind? A. I examined the ties east of the derailment for approximately a mile. I found no marks.

Q. What was the purpose of making that examination? What were you looking for? A. Looking for evidence to determine the cause of the derailment.

Q. You found no such evidence? A. I found no evidence.

Q. Was there anything there to indicate the course that the engine took when it left the rails? A. Well, nothing except the position the locomotive was in after it came to a stop.

Q. The engine was turned around, wasn't it, headed in the opposite direction? A. That is right.

Q. Put it this way,—Was there anything to indicate (201) that west of the frog that the engine first traveled on the north side of the track then swung around over the track? Was there anything to indicate that? A. The only evidence there was was the position of the engine. You could somewhat determine—you could determine, that is, what had to happen for it to be in that position.

Q. Were there any marks there of any kind made by the wheels of this engine after that left the rails that you could determine? A. Not that you could determine, marks of the engine, because immediately the locomotive left the rails the cars left the rails, it would be hard to determine which marks were made by the locomotive and which by the cars.

Q. I see. That is what I was driving at.

Mr. Kelly: That is all. You may inquire.

#### CROSS EXAMINATION by Mr. Hatch.

Q. Mr. Lentz, will you tell us where this rail is that goes in, is that right up against the main rail? Is there any points there? A. The point starts at the switch point.

Q. Well, this rail is flush up against the main rail? A. It is at one point, yes. When the switch is lined to the main track, this point is up against that rail leading in.

Q. Well, when this switch is turned so that the engine, the locomotive and cars go down the main, where is this point here? A. Right up against that rail.

Q. Right up against? A. When cars go down the main track this is the same as one solid rail along there.

Q. This is right up against it? A. Absolutely flush. Right up against it. You couldn't put a ten cent piece between (202) them.

Q. Well, now if the switch is turned so that the switch is closed so that you go into the beet switch, where is this point, the same place? A. The point separates out there about thirty inches, moves this point against this track.

Q. You mean, it goes out beyond? A. When the switch is moved this point, this portion from this joint, from here down fifteen feet, this lever pulls it out and pulls this point which is another point here against the main track to let the cars lead in.

Q. So that this point will catch this wheel, is that it? A. No, the point won't catch the wheel. There is no point in catching the wheel. The point frees the wheel to move in either one track or the other track.

Q. You mean, when it is closed so they can go into the switch? A. When this switch is open—rather, when it is open to go in there, there is a space in there of about three to four inches to let the wheel lead right in there.

Mr. Kelly: Q. Pardon. You are speaking of the south rail of the switch track? A. The south rail. Now, this is the north rail. When this switch is throwed, it leaves an opening there of about four inches and puts your point against the track so the wheels move in freely, and you can go in there possibly at a speed of possibly twenty miles an hour.

Mr. Hatch: Q. You call this a frog? A. That is correct.

Q. You call this a guard rail? A. That is right.

Q. You stated, I believe, to the jury there was some markings there? A. There was some markings there.

(203) Q. Now, if the engine, locomotive and cars had gone right down the main track, wouldn't have touched that guard rail, would it? A. Not there.

Q. So it indicates that some wheel of either the engine or one of the cars hit that guard? A. Not necessarily. It may have meant a part of the car after the cars derailed, come down and hit it. We don't know what hit it.

Q. But there was a mark there? A. There was a mark.

Q. Now, if that switch was closed then the pony trucks or the drivewheels of the locomotive would have gone right on through down the main, is that correct? A. They should normally, yes.

Q. Well, do pony trucks ever jump over on a switch like that? Do they? They don't normally do that, of course, but do they ever?

Mr. Kelly: I object to that.

Mr. Hatch: Q. —when you have a derailment?

Mr. Kelly: I object to that.

The Court: It is speculative. Sustained.

Mr. Hatch: Q. Well, you have been railroading thirty-four years, is that right? A. Thirty-three years.

Q. Thirty-three years. Have you ever had derailments on this road at switches like that—on your road?

A. We have occasionally in yard operations. I don't know—I don't recall of any on this railroad where it was

ever shown that the wheels of the engine left the rail on account of any condition there.

Q. Well, was that rail, this part of the rail, the curve before it straightens out down here, was this torn up? (204) It was, was it not? A. No; it was not.

Q. Where did it start to be torn up? A. The only place the rail was, when you reached near here, about four to five hundred feet as near as I could determine, the engine went over on the right side, turned around with the tender coupled. The front end of the engine must have nosed over into this track and damaged some rails but it was three to five hundred feet beyond this point up here.

Q. All right. It would take some force, would it not, to turn the locomotive around headed east? A. Yes, naturally.

Q. Were you able to determine what caused this locomotive to swing around, to face east? A. Yes. There were thirteen loaded cars behind it, pushing on it. After it went over on its side,—ten loaded cars, whatever was in the train.

Q. You mean, it turned first to the north, north on its side? A. As near as I can—

Q. And it swung it around? A. It swung it around. The weight of the train behind it pushed it around.

Q. You have air brakes on all those cars, do you not? A. That is right. We are required by law to have air brakes and have them inspected before leaving the terminal.

Q. How far does it take to stop a train going about thirty miles an hour—

Mr. Kelly: Objection.

Mr. Hatch: Q. —with all the airbrakes set?

Mr. Kelly: Depends on a lot of things—on the weather conditions—

Mr. Hatch: Q. —on that day as they existed that day.

(205) Mr. Kelly: Q. If you can answer, go ahead.

The Court: Q. If you can. A. I would say that it would take from three hundred to—to twelve to thirteen hundred feet.

Q. How much does a—or did that locomotive 404 weigh in your best judgment? A. Oh, I guess around—around one hundred seventy, one hundred ninety tons, depending on whether the tender is loaded and whether you have the tender on the engine.

Q. I mean, on that morning.

Mr. Kelly: Q. On that morning.

Mr. Hatch: Q. When they reached Rushmore they had used a lot of their coal? A. I don't know. I couldn't tell you exactly how many bushels it weighed. It weighed the normal amount for that type of engine.

Mr. Hatch: Q. About one hundred ninety is your best judgment?

Mr. Kelly: He said yes.

Mr. Hatch: Q. Did anybody from the Federal Government or any of their agencies investigate this derailment? A. No, sir.

Q. The ICC did not? A. No, sir.

Q. You say they sent the report to the Interstate Commerce Commission? A. The AC&Y sent the reports.

Q. I mean, the Company? A. Yes.

Q. You are the Company. A. Yes. The reports were sent to the ICC.

Q. They were made under your supervision, were they? (206) A. The reports, yes, sir.

Q. Do you have a copy of that report? A. I don't have it. I believe the copy is destroyed now. It is a matter of record in Washington, though. It could be obtained.

Q. Well, can you determine whether or not your Company here has a copy of that?

Mr. Kelly: We have not. We tried to find; our copy from the 1944 records had been destroyed, Mr. Hatch.

A. It is there available at Washington.

Mr. Hatch: Q. Did you ever see this Defendant's Exhibit 38? A. I saw it this morning. One of the witnesses had it.

Q. That is dated May, 1944, isn't it? A. I believe it is.

Mr. Hatch: That is all.

Mr. Kelly: That is all, Mr. Lentz. That is all.

Mr. Kelly: I would like to call Mr. Dice for further cross examination.

Mr. Hatch: I object to the purpose of this. What purpose would that—what is the purpose?

The Court: I don't know.

Mr. Hatch: I object.

The Court: He is putting on his case.

Mr. Hatch: I object.

The Court: Part of it.

Mr. Hatch: Take the stand. Note my exception.

And thereupon, in order to further maintain the issues upon its part to be maintained, the defendant called for further (207) cross examination the plaintiff JOHN F. DICE who, having been heretofore duly sworn, testified as follows:

RE-CROSS EXAMINATION by Mr. Kelly.

Q. Mr. Dice, in June 14, 1944 you went down to the main office of the railroad company, didn't you? A. Yes, sir.

Q. I hand you what is identified as Defendant's Exhibit 5, and ask you whether or not you took that with you at that time? A. I did.

Q. You went up to Mr. Hochberg's office, didn't you? A. Yes, sir.

Q. You gave it to him? A. Yes, sir.

Q. You told him you wanted to be reimbursed for the damage which you had sustained by reason of the loss or injury to some of your personal property that you had with you at the time of this accident, didn't you? A. Yes, sir.

Q. The handwriting which appears in pencil on that exhibit, is that your handwriting? A. It is.

Q. And the figures, are those your figures? A. Yes, sir.

Q. And you wanted \$84.19 to reimburse you for the damage or loss of personal property which occurred as a result of this wreck, didn't you? A. Yes, sir.

Q. You left this with Mr. Hochberg, Defendant's Exhibit 5, right? A. Yes, sir. He asked for it.

Q. Now, I hand you what is identified as Exhibit Number 6, and ask you if that isn't a check which Mr.

Hochberg gave to you on June 14, 1944 for \$84.19? A. Yes, sir.

Q. The amount which you claimed by way of damage to (208) your property? A. Yes, sir.

Q. What did you do with that check? A. Cashed it.

Q. All right. Where? A. I don't know. It is too long ago.

Q. All right. Now, directing your attention to Defendant's Exhibit 14, was there any stub attached to this check, Mr. Dice? A. Well, sir, I would not recall.

Q. All right. Did you read the check when you got it? A. Did I?

Q. Yes. A. Read my name and the amount on it.

Q. You didn't read anything else that was on the check? A. No.

Q. Does your signature appear on the back of the check? A. Yes.

Q. You got the money? A. I did.

Q. Did anyone ask you to come down to the office on that day? A. I can't recall if they did or not.

Q. Did anyone ask you to prepare or bring in this piece of paper, Defendant's Exhibit 5? A. Yes, sir.

Q. Who did? A. Mr. Hochberg.

Q. When did he tell you that? A. He had told me just before that to make out a list of what stuff I had lost in the locomotive, that burned up for me in my suitcase.

Q. Had you been in before, talking to Mr. Hochberg before? A. I must have been.

Q. When was it in respect to June 14th? How many days before? A. That is more than I can say.

Q. In other words, before the 14th of June you had been (209) in and talked to Mr. Hochberg about the dam-

age to the property you had with you at the time of this wreck? A. Yes.

Q. He told you to prepare the list, bring it in? A. He did, sir.

Q. This is the list you brought in? A. That is the list.

Q. You say to this jury now, do you, that you didn't read what was on the face of that check? A. That is what I said.

Q. All right. Mr. Dice, the same day that you got your check for \$84.19, you also received a check for \$139.66, didn't you?

Mr. Hatch: Just a minute. I object.

The Court: You object?

Mr. Hatch: Yes, sir.

The Court: Why?

Mr. Hatch: There is no claim here in his Answer setting up this. It is all right if he wants to go into it, but it is just bringing in a lot of things that aren't in issue.

Mr. Kelly: You claim we cheated and defrauded this man, Mr. Hatch.

The Court: Overruled.

Mr. Hatch: Exception.

Thereupon the reporter read the last question asked of the witness.

The Court: This Reply of yours, the Amended Reply says you got \$924.63.

Mr. Kelly: Yes.

(210) The Court: I guess you have a right to show how it comes about.

Mr. Kelly: Q. I hand you Defendant's Exhibit 7, ask you if that isn't a check \$139.66, which was handed to you June 14, 1944? A. Yes, sir.

Q. What did you do with that check? A. Cashed it.

Q. Got the money? A. Spent it.

Q. I didn't ask you that. Will you please answer my questions? A. Yes.

Q. We will get along very nicely. Does your signature appear on the back of that check? A. Yes, sir.

Q. Did you read the check? A. No, sir.

Q. You could read on June 14, 1944, could you not? A. I presume I could.

Q. Not what you presume. Could you? A. By spelling.

Q. I see. I hand you a document identified as Defendant's Exhibit 8 and ask you if your signature appears on there in three places? A. Yes, sir.

Q. Was that signed by you June 14, 1944? A. Yes, sir.

Q. Down at Mr. Hochberg's office? A. Yes, sir.

Q. I hand you what is identified as Defendant's Exhibit 8-a, ask you if your signature appears on that document at three places? A. It does.

Q. Was it signed by you on the 14th of June, 1944? A. Yes, sir.

Q. And those three documents, Exhibits 5, and 8 and 8-a, were signed by you the day before you went back to work, weren't they? A. Yes, sir.

(211) Q. Now, on August 8th, 1944, you again went down to the office of the AC&Y, didn't you? A. Yes, sir.

Q. Talked to Mr. Hochberg? A. Yes, sir.

Q. And said you wanted some money? A. Yes, sir.

Q. Needed some money. Right? A. Yes.

Q. Didn't on that occasion Mr. Hochberg give you a check for \$75.00? A. Yes, sir.

Q. I hand you what is identified as Exhibit Number 9, ask you if that is the check you received August 8, 1944? A. Yes, sir.

Q. What did you do with that check? A. Cashed it.

Q. Does your endorsement appear on the back of it? A. Yes, sir.

Q. Did you read it? A. No, sir.

Q. I hand you what is identified as Exhibit Number 10, ask if your signature appears on that piece of paper? A. Yes, sir.

Q. Was that signed by you August 8, 1944? A. Right there.

Q. Right there? A. Yes, sir.

Q. The same time you got this \$75.00 check? A. Yes, sir.

Q. All right. Mr. Dice, when did you first go to see Dr. E. M. Walker? A. I can't tell you.

Q. Sometime in July, wasn't it? A. It was when Mr.—when Dr. Schaffner was away there.

Q. All right. A. And he said if I had to go to see a doctor why I was to go over to Dr. Walker. That was his just like,—I guess you would call it his assistant.

Q. Now, you were over at the Akron City Hospital on (212) July 17, 1944, weren't you? A. Yes, sir.

Q. You were sent over there by Dr. Schaffner, weren't you? A. Yes, sir.

Q. You went over there for the purpose of having some X-rays made? A. Yes, sir.

Q. And on how many days were you there at that time? More than once? A. I went over either two or three days.

Q: On each of those occasions X-rays were taken?  
The Court: All right.

A: The first day, I don't think they gave me any X-rays. They give me some stuff to take and they told me to go back home and don't eat no breakfast or anything, and come back next day. So I went back next day, then they took some X-rays of me.

Q: And they took X-rays on that occasion of your stomach, didn't they? A: Yes.

Q: That is right? The lower part of your abdomen? A: Yes.

Q: Did they take it on both sides, both front and back? A: I don't remember. I know they did in the front but I can't say for sure.

Q: These X-rays were taken at a time when you had in your body the substance which they had given you to take, didn't you? A: Yes. I think they did.

Q: That is right. A: Some stuff they gave me.

Q: Now, you received from Dr. Walker a written memo or notation, didn't you? A: I do not remember.

Q: Well, I hand you what is identified as Exhibit Number (213) 11, and ask you if that isn't a note or a notation which you personally obtained from Dr. Walker? A: I wouldn't recall if I did or not.

Q: You wouldn't say that you did not? A: I wouldn't say that I—that I did or I didn't.

Q: All right. Didn't you take this letter down to the office of the AC&Y on or about July 29th or the 31st, 1944, and leave it there? A: I don't remember of that paper there.

Q: You wouldn't say that you didn't? A: I wouldn't say that I didn't; I wouldn't say that I did, because I can't recall offhand that paper.

Q. Now, on August 14th you again went down to the office of the AC&Y, didn't you? A. Yes, sir.

Q. You again talked to Mr. Hochberg? A. Yes, sir.

Q. You again said you wanted some money? A. Yes, sir.

Q. You said you needed some money to live on? A. I did.

Q. And on that occasion didn't Mr. Hochberg give you a check for \$75.00? A. Yes, sir, he did.

Q. I hand you what is identified as Defendant's Exhibit 12, and ask you if that is the \$75.00 check you received August 14, 1944? A. Yes, sir, it is.

Q. Did you cash that check? A. Yes, sir.

Q. Your signature appears on the back of it? A. Yes, sir.

Q. Did you read it? A. No, sir.

Q. Now, at the time you received this \$75.00 check, August 14, 1944, I ask you if you signed this paper which is identified as Exhibit 13? A. I did. Right there.

Q. That is right. Signed by you at the same time, (214) wasn't it? A. Yes, sir.

Q. Did you read it? A. No.

Q. Now, you again went back to the main office of the AC&Y on August 28th, 1944, didn't you? A. Yes, sir.

Q. To ask for more money? A. Yes, sir.

Q. You received a check for \$75 again? A. Yes, sir.

Q. Identified as Defendant's Exhibit 14? A. Yes, sir.

Q. What did you do with that check? A. Cashed it.

Q. Your signature appears on the back? A. Yes, sir. Right there.

Q. Did you read it? A. No, sir.

Q. All right. Well, on the same day, didn't you sign this document? A. I did, sir.

Q. Identified as Number 15? A. I did.

Q. Your signature appears there? A. Right there.

Q. Did you read it? A. No, sir. (Handing to the Court.)

Mr. Kelly: May I have the check just a moment?

Q. I again direct your attention to checks identified as 6, 7, 12 and 14 and ask you whether any of those checks had attached to them any kind of a stub? A. I will not recall.

Q. You wouldn't say that there was any stub attached to them, will you? A. No, sir. I wouldn't say there was or there wasn't.

Q. Are you colorblind? Were you colorblind in 1944? A. I don't think I was.

Q. All right. Now, in April of 1947 you again went over (215) to the Akron City Hospital, didn't you? A. Yes, sir.

Q. Who sent you into the Hospital at that time, wasn't it Dr. Simondinger? A. That is his name, yes, sir.

Q. Who sent you to Dr. Simondinger? A. A Doctor in Ellet there.

Q. Was it Dr. Schaffner? A. No. Across the street on this side.

Q. Was it—You don't know who the Doctor was? A. I can't call his name. Schaffner? No.

Q. It wasn't any AC&Y doctor was it? A. No, sir.

Q. Anyway, you were at the City Hospital on April 7th, 1947, at which time you had some more X-rays taken? A. Yes, sir.

Q. Do you remember what part of your body was X-rayed at that time? A. Yes. X-rayed me across here and across the back.

Q. On that occasion was there anything—Did you take anything by way of liquid internally to be used in connection with taking of these X-rays? A. I don't remember of taking anything. I know they tied a ball on—a big—I guess it was a rubber ball and stripped me. But in taking anything—I can't recall if I did or not.

Q. You were sent in there by some doctor who you do not know? A. Yes, sir.

Q. You were taken care of while you were there by Dr. Simondinger? A. By Dr. Simondinger.

Q. That is right? A. Lucas is that doctor's name.

Q. Dr. Lucas? Mr. Dice—Marking Defendant's Exhibits PC-1 to 22 inclusive. Mr. Dice, I hand you a document which (216) is identified as Defendant's Exhibit PC-1, and ask you if that isn't a check which you received from the Railroad Company on or about January 15, 1944? A. Yes, sir.

Q. And that check as you know represented a payment of back wages for services rendered sometime prior to that date, didn't it? A. It must be.

Q. Well, now, isn't that the truth? A. Yes, sir.

Q. All right. Now, I hand you twenty-two checks numbered PC-2 to PC-22, inclusive, and ask you whether or not these are pay checks which you received during the calendar year 1944 from the AC&Y Railroad Company? A. Yes, sir.

Q. Take a look at these checks and tell us whether each one of them has your endorsement on it? A. Yes, sir, they do.

Q. And you were paid monthly, semi-monthly or twice a month by check for your services, weren't you? A. Twice a month.

Q. Now, each one of these checks, Defendant's PC-2 to 22 inclusive, had attached a stub, didn't it? A. A little white piece of paper.

Q. Well, little stub attached? A. Yes.

Q. Which was detachable? A. Yes.

Q. Is that right? Every time you received one of these checks each one had attached to it a stub? A. Yes, sir, a little—

Q. Do you have those stubs? A. I have not all of them.

Q. Do you know what was on them? A. Why, the day and date and the amount.

(217) Q. What amount? A. Of the earnings.

Q. What else was on them, if you know? A. I couldn't tell you right now.

Q. But you—You detached from each check which I have—you have been shown here this stub, didn't you? A. Yes, sir.

Q. And then you endorsed the check and got your money? A. Yes, sir.

Q. And kept the stubs? A. Yes, sir. Supposed to keep them.

Q. Are they available for us in the trial of this case, Mr. Dice? A. They are just the same as that on there, the amount of money.

Q. Are they? I am asking you if you know? A. To tell the truth, I don't know.

Q. Directing your attention to each of these exhibits, PC-2 to 22, did you read any of them, Mr. Dice? Look at them to see what they were? A. I just—I don't know. I looked right here for my name.

Q. All you looked for, name and the amount? A. That is it.

Q. I see. When you were down at Mr. Hochberg's office on June—June 14th and August 14th and August 28th, August 8th and September 5th, did you notice any difference between the checks which were handed to you on that date and the various paychecks which you had received during the year up to this time? A. Not until just now, I take notice right there.

Q. You never noticed? A. Not until right now. I see that one corner is dark there.

(218) The Court: Q. One corner is dark?

Mr. Kelly: Q. As a matter of fact, you mean these paychecks have a dark border around them, haven't they? A. Yes, sir.

Q. The checks which you received from Mr. Hochberg, these \$75.00 checks and other checks don't have a black border? A. I don't see one.

Q. Now, Mr. Dice, I hand you what is identified as Defendant's Exhibit 39, and ask you if that isn't a copy of a withholding receipt which you received from the railroad company in the year of 1944 and at the beginning of the year 1945? A. Yes, sir, it is.

Q. And that—and you received the original from the Company which showed a total amount of your wages which you earned while working for this Company for the year 1944? A. I received the card.

Q. That is right. You received the original of this? A. Yes, sir.

Q. Where is that, do you know? A. No, sir. I do not. Looked for it; couldn't find it.

Q. Now, you understood what that was when you got it, this Defendant's Exhibit 39 or original of it. You knew what that was? A. Yes.

Q. The other card? A. Yes.

Q. All right. Now, you tell this Court and this jury whether you had any other income for the year 1944 other than what you received from the AC&Y? A. That is the only income I had.

Q. All right. Now, you tell this Court and this jury (219) how much you paid an Income Tax on for the year 1944? A. What was the amount?

Q. \$2476.92. A. I thought you meant, this here, is what you meant.

Q. No. No. A. \$2476.92.

Q. All right. In other words your Income Tax for the year 1944 was computed on total wages of \$2476.92, wasn't it? A. Yes, sir.

Q. And you didn't include in your Income Tax return for the year 1944 the \$84.19 or the \$75.00, or the \$75.00, or the \$75.00 or the \$139.66 or the \$475.78, did you? A. I can't recall. I don't—

Q. You know you didn't. Now, tell this Court and this jury.

Mr. Hatch: I object.

A. I said I don't know.

Mr. Kelly: He took the statement from his employer and return on that.

Mr. Hatch: I assume, like everybody else does.

Mr. Kelly: Move the statement of counsel be withdrawn.

The Court: Unless he is admitting that is what happened. If he admits that.

Mr. Kelly: If he admits that. Q. What do you say on that, Mr. Dice? A. I don't understand.

The Court: Q. The question is very simply. He just asked you whether or not you didn't pay your income tax based on the \$2476.92? A. When I went to get the Income Tax made out, I took that little card that I got.

(220) The Court: Q. That is what you told them? A. I took that up to them. That is all I had at that time.

The Court: Q. That is what you gave as your income for the year, wasn't it? A. Yes.

Mr. Kelly: Q. You did not give as your income for the year 1944 this \$924.63 which you received by these checks, did you, Mr. Dice?

Mr. Hatch: I object unless—

Mr. Kelly: Let him answer.

Mr. Hatch: —unless there is a showing.

The Court: Let him answer.

A. Not that I can recall.

Mr. Hatch: That is included in this other?

The Court: What did you say?

Mr. Hatch: Not that he can recall.

Mr. Kelly: Did you say it is included? Before we get through, we will show to you it is not included.

Mr. Hatch: The first time we knew that.

Mr. Kelly: It is just a matter of taking a pencil, writing them down and computing them.

Q. Now, again yesterday you were asked to produce a copy of your 1944 income tax return. Can you produce that here today? A. I said no, sir.

Q. All right. You are familiar with what is known as the Railroad Retirement Fund, aren't you, Mr. Dice?

A. Yes, sir.

Q. Do you know as a railroad man, from years of experience that the Company, as your employer was required to deduct a certain percent of your earnings for railroad retirement fund (221) purposes, don't you? A. Yes, sir.

Q. And you knew that in 1944? A. Yes.

Q. That is right. And you also knew in 1944 that the Company as your employer was required to deduct a certain percentage of your wages for income tax purposes, didn't you? A. Yes, sir.

Q. And each one of these checks—or rather, the checks, these paychecks which you received to which your attention has been directed had attached thereon a stub showing the amount of deduction for the railroad retirement fund or for the income tax deduction, didn't it? A. May I see them?

Q. Well, now, you know that is a fact? A. Yes, sir; yes, sir.

Q. And when you received these checks of \$84.19 and these \$75.00 checks and \$139.66 check and the \$475.00 check there was not attached to any of those checks that stub showing a deduction for a railroad retirement or income tax purposes, was there? A. I don't know if there was even stubs on them.

Q. As a matter of fact there weren't any stubs attached to those particular checks, were there? A. I wouldn't swear to it.

Q. Mr. Dice, I hand you what is identified as Exhibit 27, and ask you whether all the longhand writing

that appears on or in that document is your handwriting?

A. Yes, sir, it is, sir.

Q. Do you still tell this jury that you can only read by spelling out the words? A. Yes, sir.

Q. Do you still tell this jury that you can only (222) scribble? A. That is what I call it.

Mr. Kelly: That is all.

The Court: You can step down.

Mr. Hatch: I had some questions in rebuttal.

The Court: He was called for cross examination.

And thereupon, in order to further maintain the issues upon its part to be maintained, the defendant called as a witness one ALVA WILLIAM HOCHBERG, who, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Kelly.

Mr. Hatch: I am not waiving my right to examine Mr. Dice further.

(Attorneys conferring confidentially with the Court.)

The Court: We will have a recess.

Recess.

Mr. Kelly: Q. Will you state your full name?

The Court: Q. You were sworn, were you not? A. Yes, sir.—Alva William Hochberg.

Mr. Kelly: Q. Where do you live? A. 468 Marview Avenue.

Q. Akron, Ohio? A. Akron, Ohio.

Q. How old are you? A. Thirty-nine.

Q. For whom do you work? A. AC&Y Railroad.

Q. For how long have you worked for that Company? A. Twenty years.

Q. Twenty years. What kind of work do you do?  
A. Chief (223) Clerk, Supervisor of Wage Schedules.

Q. Are you an officer of that Company? A. No, sir.

Q. Are you a Director of that Company? A. No, sir.

Q. Who is your immediate superior? A. H. G. Watkins.

Q. Who is H. G. Watkins? A. Vice-President in charge of operations.

Q. Do you know John Dice? A. Yes, sir.

Q. How long have you known him? A. Since 1941.

Q. When he first became an employee of the Company? A. That is right.

Q. Generally speaking, what are your duties, Mr. Hochberg? A. Supervise the office work of the Vice-President's office.

Q. And— A. Handle working agreements.

Q. Do you recall an occasion when Mr. Dice came to your office on the 5th of September, 1944? A. I do.

Q. And on that occasion did he give to you a document which has been marked as Defendant's Exhibit 16?

A. Yes, sir, he did.

Q. Did you ask him to call at your office on that date? A. I did not.

Q. Do you know how he happened to be in your office on that day? A. No, sir.

The Court: What—Would the witness read that? He wanted it read to the jury at one time.

Mr. Kelly: Q. Read it.

The Court: Q. So that the jury may know what you are talking about. A. This is from Boyd W. Schaffner, Doctor of (224) Medicine, 589 Canton Road, Akron 12, Ohio. John Dice, The AC&Y Railroad Company, Mr.

H. G. Watkins. This is a release for Mr. John Dice who has been under

The Court: Q. Treatment? A. —Medical treatment since May 29, 1944, to return to work. Dated September 5, 1944, and signed by B. W. Schaffner.

Mr. Kelly: Q. Was that left with you on that day by Mr. Dice? A. It was.

Q. Now, Mr. Hochberg, what is the size of the room where you have your office or desk? A. About three-fourths as large as this room here.

Q. How many people work in that room, back at that time I am talking about? A. There were eight at that time.

Q. And do you remember what time of the day it was that Mr. Dice was in there? A. In the afternoon.

Q. Well, when he came into your office, where did he go, what did he do? A. He came to my desk.

Q. And what kind of a desk arrangement did you have? A. I have a double desk between the Secretary and I, and a single desk in back of me.

Q. Are these desks all adjoining, touching each other? A. There is chair space down the—

Q. Are there windows in this room where you have your office? A. The desks are all adjacent to the windows.

Q. Do you have artificial light in there? A. We do, yes.

Q. On this particular afternoon do you know whether or not the lights were lighted? A. No, I don't.

Q. Was it daylight? A. Daylight; yes.

(225) Q. Anything to obscure one's vision? A. No,

sir.

Q. How long was Mr. Dice in your office at that time? A. Approximately one hour.

Q. On that occasion, I ask you—hand you what is identified as Plaintiff's Exhibit 6 and Defendant's Exhibit 18, and ask you whether John Dice affixed his signature on those papers on that occasion? A. Yes, sir, he did.

Q. And I notice here that on each one of these documents there is some inserts in a typewriter—by a typewriter? A. Yes, sir.

Q. When were those inserts made? A. During the time Mr. Dice was in the office.

Q. And who made them if you know? A. The secretary, Mrs. Goldthread.

Q. Now, while Mrs. Goldthread was filling out these documents where was Mr. Dice seated? A. Sitting at the edge of my desk.

Q. After they were filled out, what was done with the documents? A. I handed them to Mr. Dice and told him this was a release, it would be necessary that he sign it.

Q. Did you hand both documents to him? A. Yes, sir.

Q. What did he do as far as you observed? A. As far as I observe, he picked the paper up such as I have in my hand now and looked at it.

Q. Did he sign? Do you have any idea how long he actually had those papers in front of him in point of time? A. A few minutes, I would say.

Q. Now, on that occasion did you hand to him a check (226) which has been identified as Exhibit 12, a check for \$475.78? A. After he signed the release, I handed him this check, yes, sir.

Q. When was that check prepared? A. At the same time the release was prepared.

Q. On September 5, 1944? A. Yes, sir.

Q. Who typed in the typewritten part that appears on the voucher? A. The secretary, Mrs. Goldthread.

Q. Now, on this occasion and before you gave this voucher, this check, to Mr. Dice, did you obtain or was the signature of Mr. Evans obtained? A. Yes, sir. His signature was obtained.

Q. And was the signature of E. Hunt obtained? A. Yes, sir.

Q. Was the signature of R. S. Cobb obtained? A. R. S. Cobb, yes.

Q. And who if anyone dictated the item which appears on the top of this check reading, "In full settlement account injury received at Rushmore on 10:03 A.M. on May 29, 1944"? A. I did.

Q. You dictated that to whom? A. Mrs. Goldthread.

Q. Was she the woman, the lady, that did your stenographic work there? A. That is right.

Q. I also direct your attention to—in addition to Exhibit 12, Exhibits 6, 7, 12, 14, and 9, and ask you to state whether there was a stub of any kind attached to any of those checks at the time they were given to Mr. Dice? A. No, sir.

(227) Q. Did you on the 5th of September, 1944, say to Mr. Dice that it was necessary for him to sign a paper releasing the company from all claims for loss of time and medical expenses? A. I stated to him it would be necessary to sign this release.

Q. Did you tell him what the release was for? A. No, sir.

Q. Did you tell Mr. Dice on September 5, 1944 that he needn't read this paper? A. I did not.

Q. Identified as Plaintiff's Exhibit 6 and Defendant's Exhibit 18? A. I did not.

Q. Did you tell Mr. Dice on that occasion that this paper, this release was a release for wages lost by him? A. No, sir.

Q. In addition to these checks that your attention has been directed to, these for \$75 and \$139.66 and \$475 check, did you arrange for Mr. Dice to have some dental work at the Company expense? A. I did, yes, sir.

Q. Who paid for that? A. The Company, AC&Y.

Q. Who paid for hospital expenses that Mr. Dice had at City Hospital? A. The AC&Y Railroad.

Q. Who paid for his medical attention? A. The AC&Y Railroad.

Q. Who paid for the X-rays? A. AC&Y.

Mr. Hatch: Just a minute. What medical attention?

Mr. Kelly: When he was in the hospital on May 29th to June 2, 1944.

Mr. Hatch: Limit it to that.

Mr. Kelly: Q. Mr. Hochberg, in 1944 were you familiar (223) with the method of the keeping of the records by the Company on pay records and pay checks?

A. Yes, sir.

Q. I hand you what is identified as checks marked Defendant's Exhibits PC-2 to PC-22 inclusive, and ask you whether those are the forms of checks that were used by the Company in paying of employees for their wages and services at that time for that year, that calendar year, the form of checks? A. Yes, sir. This is a regular pay check.

Q. Now, are these the regular pay checks of Mr. Dice? A. Yes, sir.

Q. Now, tell the court and jury whether each pay-check had attached to it a stub? A. It did, yes.

Q. A detachable stub? A. That is right.

Q. What was the purpose of these stubs, if you know? A. The purpose of those stubs is that the employees will have a record of deduction made from their paychecks.

Q. In other words, the check stub contains— A. All deductions.

Q. All deductions. A. There are retirement tax, —Federal Withholding Tax, Hospitalization.

The Court: Q. Social Security? A. We don't have Social Security, Your Honor.

Mr. Kelly: Q. What do you have? A. Railroad Retirement.

Q. Are those deductions compelled to be made by law, Mr. Hochberg? A. Yes.

The Court: Q. The Withholding Tax is the estimated income tax? A. That is right.

The Court: Q. You withhold the amount fixed by the Revenue Department (229) as the standard to be held for the amount of money paid? A. It is taken from a table furnished us.

The Court: Yes.

Mr. Kelly: Q. What is meant by Railroad Retirement? Explain that a little further. A. Railroad Retirement is to provide a fund for employees when they become of retirement age.

Q. Is that a fund created by law? A. Created by Federal law, yes.

Q. Is that a fund to which the employer as well as employee— A. The employee and employer contribute an equal amount.

Q. Under that Railroad Retirement Law is the employer required to make the required deduction from the employee's pay? A. Yes, sir.

Q. If it is wages or salary? A. Wages or salary.

Q. Now, directing your attention to Exhibits 6, 12, 9, 14, 12 and 7, was there anything deducted from this amount, these amounts or any other amounts in connection with these payments relative to railroad retirement or tax deduction? A. Well, no, sir. There wasn't any deduction made.

Q. But the other checks for wages there were the required deductions, is that right? A. That is right.

Q. Now, how much did the Railroad Company report to the Federal Government as the earnings of Mr. Dice for the year 1944? A. \$2476.92.

Q. And did that amount of \$2476.92 include the \$84.19 or the \$139.66 or the \$75 or the \$75 or the \$75 or the \$475.78? A. No, sir. It does not.

(230) Q. In other words, the Company did not deduct from these amounts anything for the Railroad Retirement Fund or for Income Tax? A. No, sir. We did not.

Q. Now, I hand you some documents which have been marked Defendant's Exhibit 35-A to 35-N inclusive, ask you to state what those are? A. These are sheets taken from a Timebook, one sheet made for each employe. The time that they make is recorded on these sheets.

Q. And is this document which you have in your hand an original document of the Railroad Company?

A. Yes, sir.

Q. Does this document show the exact day and number of days upon which Mr. Dice worked for the years shown 1944 down to 1947 up until the time he last ceased to work? 1941, I mean. A. Yes, sir.

Q. In other words, that is a daily record showing the exact days that Mr. Dice worked for this Company, is it? A. That is right.

Q. Does that record show the general type of work which he did? A. Yes, as to the different classes of work and class of locomotives.

Q. Is the work divided into two general classifications, Mr. Hochberg? A. Yes. We separate the road time from the yard time.

Q. Is that because there is a variation in pay? A. That is right.

Q. Was Mr. Dice considered an hourly rated employee? A. Hourly rated, yes, sir.

Q. Mr. Hochberg, I hand you an exhibit consisting of (231) several sheets which have been marked Defendant's Exhibit PR-1 to PR-21 inclusive, and ask you to state what those are. A. These are the payroll sheets that are prepared by taking the time from the previous exhibit you had here,—

Q. Keep your voice up, please. A. —having the typist type them on these sheets, send them to the Accounting Department for the preparation of paychecks.

Q. Is this the payroll record for John Dice for the year 1944? A. It is.

Q. Does this record show the total amount of his earnings for that period of time? A. It does.

Q. Does it likewise show the monthly or semi-monthly deduction for Railroad Retirement or Income Tax purposes? A. It does, yes, sir.

Q. Are these the originals? A. Those are originals.

Q. Are these records kept by the Company in its usual manner in keeping of its business records? A. Yes.

Q. Is it not a fact that a Railroad Company is required to keep records of payroll deductions for Railroad Retirement or Income Tax purposes? A. It is.

Q. And open to Government inspection? A. That is right.

Q. And can you tell us whether or not these records show the payment of these respective amounts, of \$139.66, \$225, and \$84.19 and \$475.78 as wages or salary for the year 1944? A. Those checks are not entered on there. That is a payroll sheet.

Q. And that is the one and only payroll record of the Company for Mr. Dice for this particular period of time? A. That is right.

(232) Q. And were these payroll records, that is PR-1 to PR-21, used in preparing this form, "W-2," Exhibit 31? A. They were.

Q. I think I forgot to ask you this, this form "W-2," this Withholding Receipt for the year 1944, what became of the original? A. The original is given to the employee.

Q. Mr. Dice? A. That is right.

Q. When? What time? A. By law it has to be given by the 31st of January. The exact date it was given to him, I don't know.

Q. What is the fact, a copy is likewise sent in to the Internal Revenue Department? A. We send a copy in, yes, sir.

Q. Do you keep a copy? A. We keep a copy.

Q. Is Defendant's Exhibit 39 the copy which you kept? A. That is the Company copy.

Q. By the way, Mr. Hochberg, this afternoon of September 5th, 1944, when Mr. Dice was down at your office, were there people coming and going through your office during the time that he was there? A. Yes, sir.

Q. During that afternoon, you have already said that Goldie—that Audrey Goldthread was there? A. That is right.

Q. Anyone else, any other girl or lady? A. Mrs. Pugh.

Q. Mrs. Pugh? A. Yes.

Mr. Kelly: That is all. You may inquire.—Oh, yes, one more question.

Q. Mr. Hochberg, some inquiry was made here previously about the report to the Interstate Commerce Commission of this accident. Was such a report made? A. Yes, sir.

(233) Q. What is the fact as to whether the 1944 ICC Reports of Wrecks have been destroyed? A. The ICC Reports of Wrecks have been destroyed.

Q. Are they only required to be kept a certain length of time? A. They are only required to be kept four years.

Q. How many? A. Four years.

Mr. Kelly: That is all. Thank you.

#### CROSS EXAMINATION by Mr. Hatch.

Q. Are you still Chief Clerk, Mr. Hochberg? A. I am, yes, sir.

Q. You still have an office down in the main building, do you? A. I do. Yes, sir.

Q. And where is your office with reference to Mr. Watkins? A. About as far as from here to that window from it.

Q. And you report directly to him, is that correct? A. Yes, sir.

Q. There is nobody else superior to you except Mr. Hochberg, immediately superior? A. Mr. Watkins.

Q. I mean, Mr. Watkins. Pardon. A. Yes.

Q. Referring to Plaintiff's Exhibit 6 that you state was signed three times in your office by Mr. Dice? A. Yes.

Q. That is dated, I believe, September 5th, is that correct? A. That is right.

Q. Do you remember what day of the week that was? A. No, I wouldn't.

Q. But you do remember it was sometime in the afternoon? A. That is right.

Q. And there were eight or nine people in the office? (234) A. There are eight people regularly employed in the office.

Q. Are they mostly stenographic help, clerks? A. Varied.

Q. You mean, men and women? A. Men and women and different occupations.

Q. I see. Now, I believe you said John came there in the afternoon, was there about an hour. And at that time he brought you in that paper from the Doctor? A. That is right.

Q. And did he say something about he is ready to go back to work? A. No, sir. He did not.

Q. Well, what was said by him that prompted you to have this check prepared? A. After I read the slip of

paper he gave me from the Doctor, the first, "It looks like you are ready to go back to work."

Q. Well, he said yes he was? A. That is right.

Q. All right. Then what did you do? A. I prepared the Release, had Mrs. Goldthread prepare the release, and prepared a check for him.

Q. And this Agreement and Release, that is a standard form, is it not, Number 6? A. Except in the typed part.

Q. Well, you have this standard form? There is some blank spaces, is that correct? A. That is right.

Q. You had these blank spaces filled in? A. That is right.

Q. Are you sure they were filled in at that time? A. I dictated them.

Q. Were they? A. I dictated them. Sure.

Q. Mrs. Goldthread then filled in these blank spaces? (235) A. That is right.

Q. And then you also had this check prepared, which is Exhibit 17, for \$475.78? A. Yes, sir.

Q. Now, who typed that up? A. Mrs. Goldthread.

Q. And that is dated September 5th? A. That is right.

Q. 1944? A. That is right.

Q. Now, who took this check to Mr. Evans, who apparently was the Auditor at that time? A. I took it to him.

Q. You took it to him after it was prepared by Mrs. Goldthread? A. That is right.

Q. Then you took it to E. Hunt? A. I don't know.

Q. Who is E. Hunt? A. She is the Secretary to Mr. Stewart.

Q. All right. You don't know who took it to her?  
A. Someone from Mr. Evans office. I didn't take it.

Q. You didn't? A. No, sir.

Q. Now, R. S. Cobbs is the Assistant-Treasurer? A.  
That is right.

Q. Is he still the Assistant? A. Yes, sir.

Q. Who took it to him? A. Mr. Evans.

Q. Was this check ever shown to Mr. Watkins? A.  
No, sir.

Q. At that time? A. No, sir.

Q. Where did you get the figure of \$475.78? A.  
Well, it is our policy—

Q. Now, just not what your policy was—Where did  
you get that figure?

The Court: Q. How did you arrive at that amount?

Mr. Hatch: Yes. How did you compute that? A. I  
arrived (236) at that amount by taking what he would  
have earned had he continued to work. In other words,  
we tried to make him whole.

Mr. Hatch: I ask the last go out, if Your Honor  
please.

Mr. Kelly: You asked him. Now, he has given  
you an answer.

Mr. Hatch: That last part, "we tried to make him  
whole?"

The Court: Well, he told you. Read it.

And thereupon the reporter read the answer of the  
witness.

Mr. Hatch: Q. As far as wages were concerned,  
that is correct. A. No, not as far as wages were con-  
cerned.

Q. Now, this figure represented the amount of earn-  
ings that he would have earned had he been at work on

his job in July and August of 1944 and up to September 5th, is that correct? A. That figure represents what he would have earned had he continued to work.

Q. Had he been working?

Mr. Kelly: Let him answer. Don't interrupt. I want the jury to understand.

The Court: They would like to know.

Mr. Kelly: Yes.

A. Represents what he would have earned had he continued to work.

Mr. Hatch: Q. He was off, was he not? A. Yes, sir.

Q. He reported off sick, is that correct? A. I don't know how he was reported off.

Q. Now, as a matter of fact, the time he was off came to a greater figure than \$475.78, did it not?

Mr. Kelly: Object. Well,—object. Listen, I don't (237) know what he means by this. Maybe—

Mr. Hatch: He understands it.

Mr. Kelly: I don't.

A. I don't understand the question.

Mr. Kelly: What does he mean.

Mr. Hatch: Read the question.

And thereupon the reporter read the last question put to the witness, as follows: "Q. Now, as a matter of fact, the time he was off came to a greater figure than \$475.78, did it not?"

Mr. Kelly: Object to the question.

The Court: Well, what I understand he is asking is that the \$475 just doesn't represent a loss of wages, is that what you mean?

Mr. Hatch: Well, the figure—I will rephrase it. Withdraw that question.

Q. Now, that day of September 5th when you sat and figured out what the amount of the check would be, now you did it right there in his presence, is that correct?

A. That is right.

Q. And what did you have before you? Did you have his—these payroll records? A. Yes.

Q. You had these? A. Yes.

Q. And you had the time sheets, did you not? A. No. There wouldn't be any time sheets.

Q. Well, you knew from what information you had in front of you when he had been paid last for working, isn't that correct? A. That is right.

Q. And how long he was off? A. Yes, sir.

(238) Q. And you had that information in front of you, did you not? A. Yes, sir.

Q. Now, when you figured out that day, as you say, on the 5th of September, 1944, the amount that he was off and the amount that he would have earned was greater than \$475.78, was it not?

Mr. Kelly: Object to that.

The Court: What you are saying is that if the days that he was off had been figured up that it would have amounted to more than this amount of \$470—

Mr. Hatch: That is right. It came to over \$700, did it not, and then you deducted the \$75.00 payments?

A. Yes, sir. That is the way.

Q. That is right. Because you had given him the \$75 checks, I think there are four of them, is that correct?

The Court: Three of them.

A. Three of them.

Mr. Kelly: Three of them.

Mr. Hatch: Three of them. You deducted that amount, did you not? A. That is right.

The Court: Well, if you would take \$225 plus \$475, that would give you exactly \$700? A. Some odd cents on that.

The Court: Q. Yes, some odd cents.

Mr. Hatch: Q. Seventy-eight cents. All right. I think we understand.

Q. I hand you Defendant's Exhibit 8, which is dated June 14, 1944, and ask you whether or not Mr. Dice signed those papers, that— A. Signed—

(239) Q. —that paper three times? A. Signed it in my office.

Q. I notice Mr. Watkins' signature is on that. Now, was that signed by Mr. Watkins before or after Mr. Dice signed it? A. That was signed after Mr. Dice signed it.

Q. And there is a Clara R. Pugh; is that correct? A. That is right.

Q. And A. W. Hochberg? A. That is right.

Q. Now, was your signature and that of Clara Pugh affixed before or after Mr. Watkins signed? A. To this part here we witnessed Mr. Watkins signature after he signed.

Q. Right after? A. We witnessed his signature.

Q. After he signed? A. Yes.

Q. Well, he signed after Dice, is that correct? A. That is right.

Q. And now here is C. R. Pugh and A. W. Hochberg, appears to be witnesses to John F. Dice's name. Was that signed before or after Dice signed it? A. We were the witnesses to Mr. John Dice's signature.

Q. Before or after? A. After.

Q. All right. Now, down here the second time you signed, was that before or after Watkins signed it? A.

I don't understand the question. Which do you mean when you refer to second?

Q. Here's your signature up here at the top? A. That is right.

Q. It is down here the second time. A. That is right.

Q. That is the one I am referring to, the second time. A. You want to know if we signed that after Mr. Watkins signed?

(240) Q. Yes. A. No, sir.

Q. Before? A. We witnessed Mr. Watkins' signature before that signature was put in there.

Q. Who is Clara R. Pugh? A. She is a timekeeper.

Q. How many people were in the room on June 14th when Exhibit 8 was signed by Mr. Dice? A. I don't know the exact number that were in there.

Q. About how many? A. About four.

Q. Is Clara Pugh's desk in that room? A. Yes, sir.

Q. Is—Was Mrs. Goldt read there at that time?

A. She must not have been or I would have had her witness the signature.

Q. Again, calling your attention to Exhibit Number 8, which is this paper signed on the 14th of June, now, there is a figure in there of \$139.66. How did you arrive at that figure, \$139.66? A. The same way we done the other one.

Q. In other words, this \$139.66 represents the amount of wages he would have earned had he been working? A. Represents the amount he would have earned had he continued to work.

Q. That is right, up until June 14th? A. That is right.

Q. Now, also on June 14th you gave him a check for \$84.00, is that correct? A. I don't know whether that is the right date. I gave him a check in that amount.

Q. That was for his personal belongings that were—  
A. Yes.

Q. —lost in the derailment? That is dated June 14th, is it not? A. Yes.

Q. Now, other than this check for \$84.19 and the check (241) for \$139.66 which is also dated June 14, 1944, other than those two checks and the money represented by them, did you give Mr. Dice any other money or checks? A. At that time?

Q. At that time, June 14th? A. No, sir.

Q. Did you pay Mr. Dice or give him any checks to cover any pain or suffering on that date?

Mr. Kelly: Objection.

The Court: I will sustain that.

Mr. Hatch: Note exception.

Q. Did you give Mr. Dice a check for at any time after May the 29th, 1944 covering his pain or suffering or medical expenses?

Mr. Kelly: Objection.

The Court: Why don't you find out what he did give checks for?

Mr. Hatch: They have them here.

The Court: What the items are:

Mr. Hatch: They have them here.

The Court: Then that is the answer.

Mr. Kelly: Yes.

The Court: He didn't give anything else, he didn't get anything else.

Mr. Hatch: Q. All right. Now, as a matter of fact handing you Exhibit Number 8, that \$139.66 represented lost wages, didn't it?

Mr. Kelly: Objection. Just a minute.

The Court: What does it say?

Mr. Kelly: Yes.

(242) Mr. Hatch: He just said it represents lost wages.

Mr. Kelly: Objection.

The Court: No. Let's see it. (Court looking at exhibit.) It doesn't say that.

Mr. Hatch: I know it doesn't. That is just the point, Your Honor.

The Court: All right.

Mr. Hatch: That is the point exactly.

The Court: It doesn't say that at all.

Mr. Hatch: I said to this witness that that figure represented only lost wages now that is correct, is it not?

Mr. Kelly: Objection. Just a minute.

Mr. Hatch: Well, he has admitted that.

Mr. Kelly: He hasn't admitted it at all.

Mr. Hatch: He said that is the way he got this figure.

The Court: He said that is the way he calculated.

Mr. Kelly: That is right. That is what he said.

Mr. Hatch: All right.

The Court: That is different from saying that document—

Mr. Kelly: Yes.

Mr. Hatch: Q. Did you tell Mr. Dice that this \$139.66 represented a full settlement and release and discharge from all claims, demands and causes of action whatsoever in whatever manner arising against the Akron, Canton, Youngstown Railroad Company, its successors and assigns, including such as have arisen out of

personal injuries, received at Rushmore, Ohio, 10:08 A. M., May 29, 1944?

Mr. Kelly: Now, I object, Your Honor.

Mr. Hatch: Q. Did you tell him that on June 14, 1944?

(243) Mr. Kelly: Now, I object. We get right back to where we started from yesterday on this type of testimony. Right where we started.

Mr. Hatch: It is certainly proper, Mr. Kelly.

Mr. Kelly: Have you got any law, Mr. Hatch? Have you got any law he was obligated to speak or not to speak on this subject?

Mr. Hatch: Yes, sir.

Mr. Kelly: Let's have it. Let the Court have the benefit of this research.

Mr. Hatch: 142 Ohio State, the Supreme Court seems to agree with me and not with you, Mr. Kelly.

Mr. Kelly: I am objecting and will be very glad to present my views to the Court if the Court is interested.

The Court: That was in June?

Mr. Hatch: June 14th.

The Court: I will sustain it.

Mr. Hatch: (Proffer: Expect the witness to say that he did not tell Mr. Dice that. That the plaintiff feels it competent because there was an obligation on the part of Mr. Hochberg to disclose to him and not to conceal the fact that this was a full and complete release of all claims and demands.)

Mr. Hatch: Q. Did you read this Exhibit 8 to Mr. Dice? A. No, I didn't read it to him.

Q. He didn't read it either, did he?

Mr. Kelly: Objection. How would this man know whether he read it or not?

(244) Mr. Hatch: He was there, Mr. Kelly. He knows all about it. He was there.

Mr. Kelly: I object.

Mr. Hatch: He testified in detail—who was there and what sort of day it was.

The Court: Of course, a question arises if a man looks at a paper, you don't know whether he is reading it or not. Q. Did he take it in his hand and look at it? A. He did, yes, sir.

The Court: All right. I think that is as far as he can go.

Mr. Hatch: I think he can answer the question, Your Honor.

The Court: How would he know?

Mr. Hatch: Now, if he knows. If he doesn't know, all right. But if he knows I think he should be made to say.

The Court: You asked, did he read it?

Mr. Hatch: Q. If you know.

The Court: Q. Do you know whether he read it or not? A. No, I don't know.

Mr. Hatch: Q. Now, as a matter of fact, before Mr. Dice signed this, didn't Mr. Dice say, "Well, now, what if I have a recurrence? What will you do then?" Didn't he say that? A. Yes.

Q. And didn't you say, "Well, if you bring in a paper from your Doctor, we will reopen the case"? A. I did not.

Q. You did not? A. I did not.

Q. You didn't say that on June 14, 1944? A. I did not.

(245) Q. Well, now, as a matter of fact you did reopen the case, didn't you?

Mr. Kelly: Objection. Just a minute.

The Court: I will sustain it in that form.

Mr. Hatch: All right. Now, this is June 14, 1944.

On August 28, 1944 you gave him that check, did you not? A. I did.

Q. That is after June 14th, isn't it? A. Yes.

Q. On August— A. Yes.

Q. What was that \$75.00 for?

The Court: What does it say?

Mr. Hatch: Q. Why did you give Mr. Dice that check, Number 14?

Mr. Kelly: Objection. Just a minute.

The Court: Doesn't the check say?

Mr. Kelly: It says on the face.

The Court: What does it say?

Mr. Hatch: "For additional partial settlement of injury received at Rushmore, 10:08 A. M. on May 29, 1944."

The Court: Well.

Mr. Hatch: Q. That is why you gave it to him, didn't you? A. That is right.

Q. Handing you Exhibit Number 9, check, August 8, 1944, for \$75.00. Now, that is for additional partial settlement of the personal injury received Rushmore, Ohio 10:08 A. M. May 29th, 1944. That is why you gave it to him? A. That is right.

Q. Exhibit Number 12 is dated on— A. August 14th.

The Court: Q. A little louder, Mr. Hochberg. Talk louder, please. (246) A. Yes.

Mr. Hatch: Q. August 14th, for \$75.00, which says on there, "For additional partial settlement of injury received at Rushmore, 10:08 A. M., May 29, 1944"? A. Yes, sir.

Q. That is why you gave it to Mr. Dice? A. That is right.

Q. Then in September you gave him Exhibit Number 17 for \$475.78, did you not? A. Yes.

Q. So that you did reopen Mr. Dice's case after June 14th, 1944.

Mr. Kelly: Objection.

The Court: Sustained.

Mr. Hatch: Except.

The Court: Let's see that \$475.78. You have talked a lot about it. (Handing to Court.) Q. What does that say on the top? It is on the other side, "Partial payment"? What does that say? A. This one says, "In full settlement on account of injury received at Rushmore, Ohio, at 10:08 A. M., May 29, 1944."

Mr. Hatch: Q. Now, Exhibit Number 7, June 14, 1944, says, "In full settlement of personal injury received at Rushmore, Ohio, 10:08 A. M., May 29, 1944, doesn't it"? A. That is right.

The Court: What is that one?

Mr. Hatch: That is the June 14th.

The Court: Q. Let's see. This man went back to work right after that? A. June 15th, yes.

The Court: Q. The 14th of June he went back to work?

(247) Mr. Hatch: Q. He only worked a few days, didn't he? A. I don't know how long he worked.

Q. Now, you stated here that you paid all the medical expenses in connection with this? Did you pay Dr. Schaffner?

Mr. Kelly: Object. He didn't say all expense.

The Court: He didn't say that.

Mr. Kelly: He didn't say all expense.

Mr. Hatch: After we pinned him down.

The Court: He didn't say that now. Be accurate.

Mr. Hatch: Just so. I think I could point out in the record where he did.

The Court: Ask him what he did.

Mr. Hatch: Q. Did you pay Dr. Schaffner? A. No, sir.

Q. You paid for the X-rays taken at City Hospital?

Mr. Kelly: Which ones? Object unless you specify the ones.

Mr. Hatch: Q. In July of 1944. A. If they were ordered by our Company Doctor we paid for them, yes, sir.

Q. You paid for some in June when he was in the hospital? A. We paid for all the X-rays that were ordered by our Company Doctor.

The Court: Q. Did Dr. J. D. Smith examine this man? A. Yes.

The Court: Q. Did you pay for that? A. Yes.

The Court: Q. Dr. J. D. Smith is dead now, isn't he? A. Yes, he is, Your Honor.

Mr. Hatch: Q. Now, these checks or Pe-2 to 22 inclusive, are those his gross earnings, or are those the net earnings (248) after you have deducted the tax and retirement? A. These are the net earnings after all deductions.

Mr. Kelly: Q. Keep your voice up. A. Yes, sir.

Mr. Hatch: Q. You speak over there to them.

The Court: Q. Does that stub show what gross is? A. No, sir.

The Court: Q. It just shows deduction? A. You would have to add deductions.

The Court: Q. If you have the amount of your check plus deductions you would have your gross? A. That is right.

Mr. Hatch: Q. All right, in other words, this is what we know now as take-home pay, right? A. That is take-home pay.

Q. After everybody deducts their part. Do you happen to have any notes or figures of your figuring on September 5th and June 14, 1944 when you were figuring out how much John had coming? A. No, I don't.

Q. You don't have any record or notes of that, do you? A. No, sir.

Q. Did you do that figuring yourself or did someone there at the office figure that for you? A. I had an assistant and I checked the figures.

Q. Who was that assistant? A. Mrs. Pugh.

Q. Mrs. Pugh? A. Yes.

Q. She is what—the timekeeper? A. Timekeeper.

Q. Now, on September 5th was Mrs. Pugh there at that time? A. I presume she was, yes, sir.

Q. She did not witness this Exhibit 6 here, did she? That is September 5th.

(249) The Court: Q. Her name is not on there? A. No. Mrs. Goldthread.

Mr. Hatch: Q. Did she help you on that day figure out what John had coming? A. Yes, sir.

Q. Now, you say this Exhibit Number 6, dated September 9th, 1944 was on September 5, 1944, was signed in your office in the afternoon, I believe you said? A. That is right.

Q. Now, if you know did John read this Exhibit 6?

Mr. Kelly: Objection.

Mr. Hatch: Q. If you know.

Mr. Kelly: All right. If he knows.

A. I don't know whether he read it or not.

Mr. Hatch: Q. All right. And did you read it to him?

Mr. Kelly: Q. Objection. Oh, he can answer.

The Court: Go ahead and answer if he did. Q. Did you read it to him? A. No, sir, I did not.

Mr. Hatch: Q. And did you tell Mr. Dice that this was a release only for his wages lost, loss of time up to date? A. I did not.

Q. And did you inform him that it constituted a complete settlement of all claims or demands whatsoever arising out of this injury?

Mr. Kelly: Objection.

The Court: I will sustain that question. You didn't plead that.

Mr. Hatch: (Discussion with the Court confidentially) (Expect the witness to testify that he did not reveal to John Dice the fact that the purported agreement and release contained a full and complete release of any and all claims and demands (250) arising out of the occurrence of May 29, 1944.)

Q. Now, calling your attention to September, 1944 and Plaintiff's Exhibit 6, did John Dice to your best recollection say to you, "What if I have a reaction"? Did he say that to you?

The Court: Recurrence.

Mr. Hatch: Q. Or re-action or recurrence? A. Yes, he said that.

Q. He did.

The Court: On what date?

Mr. Hatch: September, 1944.

The Court: All right.

Mr. Hatch: ~~At the time the Exhibit 6 was signed.~~

Q. All right. Now, you remember that? Now, did he or did you say to him, "Well, we will reopen the case or the book again like we did before"?

Mr. Kelly: Objection.

The Court: What are you objecting—

Mr. Kelly: 126 Ohio State. If we are going into that, we are switching to another theory.

The Court: That was an action in contract.

Mr. Kelly: Yes. Where do we go.

The Court: Of course, it is in future time anyway.

Mr. Kelly: Yes.

Mr. Hatch: Was the representation as to a past fact.

The Court: I will sustain it.

Mr. Hatch: (Expect the witness to reply that he did tell Mr. Dice that they reopened the case before, we will reopen it (251) again if you bring a statement from your Doctor.)

Mr. Hatch: Q. In September, 1944, when Mr. Dice signed this Exhibit 6, did you tell him that this was for that this release covered wages only?

Mr. Kelly: Objection.

The Court: He can answer that. He answered that.

A. I did not.

Q. All right. Now, none of this money or this check of \$475.78 represented payment for any injury, did it?

Mr. Kelly: Objection.

The Court: Objection sustained.

Mr. Hatch: (Expect the witness to testify that it did not represent payment for any personal injury received May 29, 1944.)

The Court: Mr. Hatch—(Talking to counsel confidentially).

Mr. Hatch: Q. Now, this Exhibit Number 6 signed by Dice in September you say was—you took a standard form. What did you have, a lot of them there in your desk?

Mr. Kelly: Your Honor, I object on the ground it is repetitions.

The Court: Yes. You have been through that.

Mr. Hatch: Q. Well, you say this was filled in there and you dictated this on February—or September 5, 1944?

Mr. Kelly: Object. He said yes.

The Court: That is what he said. He gave you the details.

Mr. Hatch: Q. And Dice was there at the time? A. I answered that he was, yes, sir.

Q. Will you look at that again, referring to Exhibit 6? (252) Now up here it is dated September 5, 1944, is that correct? A. That is right.

Q. And the check for \$475.78 is likewise dated September the 5th, 1944, that is Exhibit Number 17, is that correct? A. Yes, sir.

Q. September 5th? A. Yes, sir.

Q. How do you account for the check that it is signed on the 9th day of September, 1944? A. I can't account for it unless it is a typographical error.

Q. All right. Is this a typographical error down here? A. It appears that it is, yes, sir.

Q. September 9th. Are you sure it was on the 5th?

A. Yes.

Q. How many other errors are on there?

Mr. Kelly: Objection.

Q. Do you want to look at it?

Mr. Kelly: Ask him, Mr. Hatch.

Mr. Hatch: Q. Do you want to look at Plaintiff's Exhibit 6 again and tell me how many other errors there are on that?

Mr. Kelly: Objection.

Mr. Hatch: Q. If you can detect them?

Mr. Kelly: Objection.

The Court: That is argumentative.

Mr. Hatch: It is not, Your Honor. He said there was some errors. That is all.

#### RE-DIRECT EXAMINATION by Mr. Kelly.

Q. Mr. Hochberg, did Mr. Dice ever complete his examinations for promotion to an engineman? A. The written examination?

(253) Q. Yes. A. No, sir.

Q. And is Mr. Dice still being carried on the Company rolls as an employe of the Company? A. He is carried on the Fireman's Seniority Roster.

Q. And under the rules of the Union and under the rules of your Company provided he can pass the prerequisite physical examination is he eligible for employment with your Company? A. He is. Yes, sir.

Mr. Kelly: That is all.

Mr. Hatch: That is all.

And thereupon, in order to further maintain the issues upon its part to be maintained, the defendant called as a witness one MRS. AUDREY GOLDFHEAD who, being first duly sworn, testified as follows:

## DIRECT EXAMINATION by Mr. Kelly.

Q. May we have your name? A. Mrs. Audrey Goldthread.

Q. Where do you live? A. 903 Aberdeen Street.

Q. Akron, Ohio? A. Akron, Ohio.

Q. I take it, you are over twenty-one? A. Yes, sir.

Q. Where do you work? A. AC&Y Railroad.

Q. How long have you worked for that Company?

A. It will be twenty-four years on March 9, 1950.

Q. What kind of work do you do? A. Secretary to Mr. Watkins.

Q. How long have you been such secretary? A. Oh, let's see. I can't tell you offhand. I am sorry.

(254) Q. I hand you what is identified as Exhibit 6 and Exhibit 18 and ask you whether or not your signature appeared on each one of those documents? A. It does.

Q. Can you tell us when your signature was affixed thereto? A. Immediately after Mr. Dice signed and after Mr. Watkins.

Q. What date? A. On the 5th of September in both cases, 1944.

Q. All right. Did you prepare the inserts that are shown on these documents? A. I did.

Q. Where did you receive the information in that preparation? A. From Mr. Hochberg.

Q. Where is your desk in respect to where Mr. Hochberg is? A. Right across the double desk from Mr. Hochberg.

Q. The typed portion, was that done by you at your desk? A. It was.

Q. About how long was Mr. Dice in your office, in this room on this occasion, would you say? A. Oh, offhand, I would say about an hour.

Q. Did you hear Mr. Hochberg say to him, to Mr. Dice, it would be necessary for him to sign this paper releasing the Company for all claims for loss of time and medical expense before he could go back to work? A. No. He handed him the paper, told him that was a form of release.

Q. What did you see Mr. Dice do with the paper? A. He looked at it quite some time.

Q. Where was Mr. Dice when he looked at it? A. I think to the left of Mr. Hochberg.

(255) Q. How far were you from Mr. Dice when he had these papers in his hand? A. Well, just the distance of a double desk, about four or five feet.

Q. Were you in hearing distance? A. I was.

Q. —of either Mr. Dice or Mr. Hochberg when he talked to Mr. Dice? A. I was.

Mr. Kelly: That is all. You may inquire.

CROSS EXAMINATION by Mr. Hatch.

Mr. Hatch: Q. That was in September? A. Yes, sir.

Q. Was that on the 5th or the 9th? A. On the 5th. I probably did that, why I don't know.

Q. You have worked there how long? A. It will be twenty-four years in March.

Q. And you recall back in September, 1944 just what Mr. — A. I do.

Q. —Hochberg said? You do? A. I do.

Q. You recall what Mr. Dice said? A. I do.

Q. And did you assist in figuring out the amounts? A. No.

Q. Of \$475? A. No.

Q. Did you type up the check? A. Yes.

Q. And did you have it signed? A. No.

Q. Did you discuss this with Mr. Watkins? A. Not—don't have to. Mr. Hochberg—

Q. Did you? A. No. Mr. Hochberg has that authority.

Q. Mr. Hochberg has that authority? To make out these releases? A. That is right.

Q. And these checks? A. That is right.

(256) Q. Now, have you talked to Mr. Watkins about this recently? A. No, sir.

Q. Have you talked to Mr. Hochberg about this recently? A. I have had no occasion to. That was in 1944.

Q. Have you talked to Mr. Kelly about this? A. I have never seen Mr. Kelly before in my life.

Q. Did somebody ask you to come in here? A. I was asked to come up here as a witness.

Q. By whom? A. Mr. Hochberg.

Q. Then you did talk to him, didn't you? A. Well, he said he might require me as a witness.

Q. You—then you did talk to him?

Mr. Kelly: Wait. Ask her what—Well, all right. Go ahead.

Mr. Hatch: That is all.

Mr. Kelly: That is all. You may step down.

Mr. Kelly: That is all I have this evening, Your Honor.

The Court: It is four o'clock.

And thereupon, after the usual admonition by the Court to the jury, Court adjourned until nine o'clock A.

M., October 18th, A. D. 1949, at which time Court having convened pursuant to adjournment, the trial of said case proceeded as follows:

And thereupon, in order to further maintain the issues upon its part to be maintained, the defendant recalled as a witness one A. W. HOCHBERG who, having been heretofore duly sworn, testified as follows:

(257)

RE-DIRECT EXAMINATION by Mr. Kelly.

Q. Mr. Hochberg, I hand you what is identified as Exhibit 11, and ask you whether Mr. Dice brought that in to you on or about July 29, 1944 or July 31, 1944?

Mr. Hatch: Object.

The Court: Read the question. (Question read.)

Mr. Kelly: Mr. Dice was asked about that yesterday. He said he didn't remember.

The Court: Well, what is the objection? It is just one day or another, July 29th.

Mr. Hatch: Well, that is—

The Court: He brought it in?

Mr. Hatch: —report from some doctor we don't remember about.

The Court: It is his Doctor?

Mr. Hatch: He doesn't remember.

Mr. Kelly: That doesn't make it inadmissible, the fact.

The Court: He may answer.

A. He did bring this in.

Mr. Kelly: Q. Did he leave it with you, Mr. Hochberg? A. Yes.

Q. I hand you what is identified as Exhibit Number 24, and ask you whether that is a printed form of an agreement between the Company and the representative unions for the conductors, brakemen, enginemen, firemen and hostlers? A. This is the agreement covering the working condition of that class of employees.

Q. And was Mr. Dice furnished a copy of that agreement? (258) A. All employees are furnished a copy of this on entrance to the service.

Q. Does that include Mr. Dice? A. Yes.

Mr. Hatch: As of when?

Mr. Kelly: As of May, 1944, as of 1944.

A. Or as of 1944.

Mr. Kelly: Q. Is that right? A. That is right.

Mr. Kelly: I think that is all.

#### RE-CROSS EXAMINATION by Mr. Hatch.

Q. Mr. Hochberg, the time here—it indicates effective March 1, 1929. Have there been any amendments to that? A. Yes, there have.

Q. Now, will you look at that Exhibit 24 and tell me if that agreement is in effect today? A. This book?

Q. Yes. A. Yes, sir, it is.

Q. In the same form as it is in here? A. With the exception of the rates of pay.

Q. Now, these rates of pay—

Mr. Kelly: Q. Keep your voice up, Al.

Mr. Hatch: Q. These rates of pay that are shown in this exhibit were in effect as of what date? A. Without checking them I would say those were the increases that were placed in effect in December, 1943.

Q. And how many increases have there been since 1943? A. Three.

The Court: Well, this isn't being offered as bearing upon wages, is it?

Mr. Kelly: It is being offered as bearing on the rules (259) of the Company.

The Court: There is no issue here about what his wages were because you have taken the books and shown what he earned.

Mr. Kelly: That is right.

The Court: Q. Do I understand that this is a—represents—a part of the agreement between the employees through their Union and the Company? A. That is right. That is the working agreement.

The Court: Q. It is not Company rules, as such, but it is the contractual—

Mr. Hatch: —Agreement. That is right.

The Court: Q. —Agreement between the Company and the Union? A. That is right.

Mr. Kelly: Which is binding upon the Company as well as the members of the unions.

The Court: Yes.

A. Both parties have signed.

Mr. Hatch: Q. Now, Section 19-d says this: "No fireman shall be deprived of his right to examination, nor to promotion in accordance with his relative standing on the fireman's roster, because of any failure to take his examination by reason of the requirements of the company's service, by sickness, or by other proper leave of absence; provided that upon his return he shall be immediately called and required to take examination and accept proper assignment." Now is that still in effect?

A. Yes, sir, it is.

Mr. Hatch: That is all.

Mr. Kelly: That is all.

(260) Mr. Kelly: I would like to call Mr. Dice for further cross examination, a few questions.

And thereupon, in order to further maintain the issues upon its part to be maintained, the defendant called for further cross examination the plaintiff, JOHN F. DICE, who, having been heretofore duly sworn, testified as follows:

FURTHER RE-CROSS EXAMINATION by Mr. Kelly.

Mr. Kelly: Q. Mr. Dice, I hand you Exhibit Number 24 and ask you whether or not you received a book similar to that from the Company? A. Yes, sir.

Q. Do you have your book here with you today? A. No, sir.

Mr. Hatch: I have got it.

Mr. Kelly: Have you got it?

Mr. Hatch: Yes.

Mr. Kelly: Well, the book—May we have it, Mr. Hatch?

Mr. Hatch: Yes. I am pretty sure I have it somewhere.

Mr. Kelly: Q. Mr. Dice, I hand you what is identified as Exhibit 24-a, and ask you whether that is the book which you received when you started to work for this Company? A. Yes, sir.

Q. When did you receive that book? A. Received it in 1941.

Q. 1941? A. Yes, sir.

Q. And you have had it in your possession since that time, I take it? A. Yes.

Q. And you have—I think you said the other day that (261) since 1941 you have been a member of the

Brotherhood of Locomotive Firemen, Enginemen, is that right? A. Yes, sir.

Q. Still maintain your membership in the Union?

A. Yes, sir. The only thing is while I am off I don't need to pay.

Q. That is right. Now, Mr. Dice, as a fireman out on a run,—you are required to familiarize yourself with orders which are given for the movement of the train by the dispatchers, are you not? A. Yes, sir.

Q. And it is a part of your duties to personally read and familiarize yourself with each train order, isn't it?

A. Yes, sir.

Q. Those train orders are in writing? A. Yes, sir.

Q. And it is also a part of your duty as a fireman out on a run—to see that the train order also comes to the attention of your engineman, isn't it? A. Yes, sir.

Q. In other words, both of you when you are out on a run in operating an engine, train, are required to read the orders and familiarize yourself with the orders? A. That is right.

Q. So back in May, 1944, you could read the various orders which you received in your daily work? A. By spelling them out, making the best I could out of them.

Q. Now, you have been doing that for how many years? A. Oh, from 1944 to 1947.

Q. Well, you did it before 1944, didn't you? A. No, sir. I worked in the yards.

Q. Didn't you go out on the freight runs in 1944, before May 1944? A. On the B&O.

(262) Q. Oh, no. On the AC&Y. A. I said 1941.

Q. You said 1944. A. I beg pardon. I meant 1941.

Q. All right. Now, how many orders would you receive on a run between Akron and Delphos, Mr. Dice?

A. Well, that just depends.

Q. Well, just how many—how much, what would the variation be? A. Oh, I would say right offhand, roughly, four or five orders.

Q. All right. A. At various stands.

Q. Those orders would be in writing? A. Yes, sir.

Q. They would come to your personal attention? A. Yes, sir.

Q. And you would read them and familiarize yourself with the order, would you not? A. Give it to the engineer.

Q. Yes. But you knew what was in the order before you gave it to the engineer, wouldn't you? A. No, sir.

Q. Didn't you read them? A. No, sir, the engineer gets them first.

Q. You tell this jury you got those orders and did not know what was in them? A. Sometimes the engineer would read them aloud.

Q. Didn't you get them? A. Sometimes they wouldn't. Sometimes they would hang them on a hook.

Q. Weren't you charged with responsibility of familiarizing yourself with each train order? A. Supposed to.

Q. You have been railroading since 1941 for this Company? A. For this Company.

Q. Mr. Dice, I hand you what is identified as Defendant's (263) Exhibit 49, and ask you whether the longhand writing that appears on that document was

placed thereon by you? In other words, is that your writing? A. Not all of it.

Q. Well, tell us what part is not yours. A. This part right here isn't mine.

Q. Well, read out—tell us what part is not yours, Mr. Dice? You mean question number eleven, part of question number eleven? A. Yes. Right there.

Q. All right. Is the rest of it yours, Mr. Dice? A. And this here isn't my writing.

Q. You mean: Mother—Fanny Dice? A. Yes. No, this isn't my writing.

Q. All right. Any more not your writing? A. No, sir. The rest is mine.

Q. This is an application which you filled out for employment with this Company as a fireman back in June, 1941? A. Yes, sir.

Q. At that time you could write, couldn't you? A. Yes, sir.

Mr. Kelly: That is all.

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Mr. Kelly: Can we stipulate on this?

Mr. Hatch: I think we agreed.

Mr. Kelly: It is stipulated by and between counsel for the parties hereto that Exhibits 31 and 31-B are reports of Roentgenographic examinations of Mr. Dice made at the City Hospital of Akron on the dates shown in each of these reports and that each report includes the findings or impressions that were made (264) at that time. It is further stipulated by and between counsel for the parties hereto that said—exhibits may be received in evidence and that it is not necessary to call the personnel of City Hospital to identify the exhibits and to read the reports. Is that correct, Mr. Hatch?

Mr. Hatch: We will stipulate that if they were called they would state that they are the records and that—I may want to object to the competency but they can be identified, you would not have to bring in any radiologist to prove them. I want to reserve my right to object to the competency.

The Court: Aren't they hospital records, made in the general course?

Mr. Kelly: Yes, but they were not made at the time of the original hospitalization, Your Honor. These were reports made in 1944 and 1947.

The Court: Later? I understand.

Mr. Kelly: They are not a part of the original hospital record as such.

The Court: The original check-up?

Mr. Kelly: That is correct.

The Court: I don't see why they couldn't be received in evidence under the recent statutes.

Mr. Kelly: They are business records.

The Court: Yes.

Mr. Hatch: We admit they are,—they are the records of the hospital.

The Court: All right, then. There isn't anything to it. (Which said exhibits marked Defendant's Exhibits 31 and 31a are hereto attached and made a part of this Bill of Exceptions.)

(265) Mr. Kelly: At this time defendant asks that there be received in evidence Defendant's Exhibit 5.

The Court: That is the personal property itemization?

Mr. Kelly: Yes, that is right.

The Court: All right.

Mr. Kelly: Defendant asks there be received in evidence Defendant's Exhibit No. 6, which is the \$84.19 check of June 14, 1944.

The Court: It may be received.

Mr. Kelly: Defendant asks that there be received in evidence Defendant's Exhibit 7, which is a check of June 14, 1944 for \$139.66.

The Court: It may be received.

Mr. Kelly: Defendant asks that there be received in evidence Defendant's Exhibit Number 8, which is an instrument denominated Agreement and Release of June 14, 1949.

Mr. Hatch: No objection.

The Court: Yes, it may be received.

Mr. Kelly: Defendant asks that there be received in evidence Defendant's Exhibit 8-a, which is a facsimile of Exhibit Number 8.

The Court: A facsimile?

Mr. Kelly: Yes. Two, an original and a carbon. An executed carbon as well as original.

Mr. Hatch: There is no objection but it is duplication.

The Court: All right. Let it in.

(Which said exhibits marked Defendant's Exhibits 5, 6, 7, 8 and 8a are hereto attached and made a part of this Bill of Exceptions.)

(266) Mr. Kelly: Defendant asks there be received in evidence Defendant's Exhibit 9 which is the \$75.00 check of August 8, 1944.

The Court: It may be received.

Mr. Kelly: Defendant asks there be received in evidence Defendant's Exhibit 10, which is a receipt for \$75.00 of August 8, 1944.

The Court: That may be received.

Mr. Kelly: Defendant asks there be received in evidence Defendant's Exhibit 11, which is a letter from Doctor Walker addressed to Mr. Watkins dated July 29, 1944.

The Court: It may be received.

Mr. Hatch: Objection to that and except.

The Court: What is your ground.

Mr. Hatch: It is not the best evidence. Dr. Walker is available if they want to bring him in.

The Court: What can they do with your doctor?

Mr. Hatch: It is not our doctor. He is not our doctor.

The Court: Yes, he was your doctor. Your doctor sent you to him during his absence.

Mr. Hatch: I believe that is right.

The Court: Certainly.

Mr. Kelly: There appears to be two exhibits marked Defendant's Exhibit 12, Your Honor.

Mr. Hatch: The check, that is—no objection to that.

Mr. Kelly: Well, no. At this time we ask that for the purpose of the record in its entirety at this time check of (267) August 14, 1944 for \$75.00, which is presently marked Exhibit Number 12 be re-identified as Exhibit Number 12-a, because we already have a 12.

The Court: All right.

Mr. Hatch: It is all right.

The Court: It will be received in evidence.

Mr. Kelly: Defendant asks there be received in evidence Defendant's Exhibit 12, a check of September 5, 1944 for \$475.78.

Mr. Hatch: No objection.

Mr. Kelly: Defendant asks there be received in evidence Defendant's Exhibit 13, which is a receipt for August 14, for \$75.00.

The Court: It may be received.

Mr. Kelly: Defendant asks there be received in evidence Defendant's Exhibit 14, which is a check for \$75.00 dated August 28, 1944.

The Court: It may be received.

Mr. Kelly: Defendant asks there be received in evidence Defendant's Exhibit 15, which is a receipt for \$75.00 dated August 28, 1944.

The Court: It may be received.

Mr. Kelly: Defendant asks there be received in evidence Defendant's Exhibit 16, which is a statement by Dr. Schaffner.

The Court: It may be received.

Mr. Kelly: Addressed to Mr. Watkins.

(Which said exhibits marked Defendant's Exhibits 9, 10, 11, 12, 12-a, 13, 14, 15, and 16, are hereto attached and made a part of this Bill of Exceptions.)

(268) Mr. Hatch: I know I referred to 17 in the record. May it be stipulated that Exhibit 12 may have been referred to as Exhibit 17? It is one and the same instrument.

Mr. Kelly: All right.

The Court: Anyway, that is the \$475 check?

Mr. Kelly: That is right.

Mr. Hatch: And Seventy-eight Cents.

Mr. Kelly: Defendant asks there be received in evidence Defendant's Exhibit 18, which is the—one of the copies or executed copies of the agreement and release of September 5, 1944?

Mr. Hatch: No objection. I have no objection to any of these if he wants to put them all in.

Mr. Kelly: Then I won't—

Mr. Hatch: No use reading them all. Put them all in.

Mr. Kelly: All right, then. It is stipulated by and between counsel for the parties hereto in addition to the exhibits which have already been enumerated and admitted into evidence, that Exhibits Pc-1 to Pc-22; Exhibits 24 and 24-a; Exhibit 27, Exhibits 31 and 31-B, Exhibits 35-a to 35-n inclusive, Exhibit 38, Exhibit 39, Exhibits PR-1 to PR-21 inclusive, and Exhibit 40 be admitted and received in evidence.

The Court: All right.

(Which said exhibits, marked Defendant's Exhibits 17, 18, Pc-1 to Pc-22, 24 and 24-a, 27, 31 and 31-B, 35-a to 35-n, 38, 39, PR-1 to PR-21 and 40 be hereto attached and made a part of this Bill of Exceptions.)

Mr. Kelly: With that defendant rests.

(269) Mr. Hatch: Will you stipulate we made a tender?

Mr. Kelly: It is admitted in the pleadings.

Mr. Hatch: Can we stipulate it?

Mr. Kelly: Put it in the record.

Mr. Hatch: It is stipulated, if the Court please, by and between the parties that the plaintiff Mr. Dice tendered and offered to repay to the AC&Y the sum of \$924.63.

Mr. Kelly: Let's fix a time.

Mr. Hatch: And that they refused to accept such tender.

The Court: All right. When?

Mr. Kelly: Let's fix a time.

Mr. Hatch: Well, prior to the filing of the first Reply, whenever that date is.

Mr. Kelly: Well, that is subsequent.

The Court: We will find out, August 4, 1947, the first Reply was filed.

Mr. Hatch: Prior to. —

The Court: Then just prior to August 4, 1947.

Mr. Kelly: And subsequent to the time of the filing of the Answer by the defendant on June 20, 1947.

The Court: Yes, because the Answer was filed.

Mr. Kelly: I want the record clear on that.

The Court: All right.

Mr. Kelly: Won't be any question.

Mr. Hatch: I am not sure on that, whether I made that before we filed Petition or after. I think it must have been after because the first time I knew about any purported release—

Mr. Kelly: Well, now, have we got the record straight? (270) Be sure we have. He says he made the tender after being informed of the Release, which is true.

Mr. Hatch: I don't know the exact date. Some people are more sure of dates than I am.

Mr. Kelly: It is right here, Mr. Hatch.

Mr. Hatch: I know it but I know I made it myself in your office, I can't remember. Can you?

Mr. Kelly: Got a record of it.

Mr. Hatch: Let's have the date, refresh my recollection.

Mr. Kelly: Do you want the exact date?

Mr. Hatch: I had a note of it but I can't seem to locate it.

The Court: Well, the defendant filed an Answer on June 20, 1947 wherein he pleaded this Release—wherein the Company pleaded this Release.

Mr. Hatch: I believe it was around the last of June.

Mr. Kelly: Well, to be exact, it was on Friday, July 25th, 1947. Now, do you agree to that?

Mr. Hatch: If your notes say that, I don't disagree.

The Court: You made the tender on that date.—That is what is being stipulated, Members of the Jury.

Mr. Hatch: Do you rest?

Mr. Kelly: Yes.

And thereupon, in order to further maintain the issues upon his part to be maintained, the plaintiff recalled as a rebuttal witness himself (271) JOHN F. DICE, who, having been heretofore duly sworn, testified as follows:

#### DIRECT EXAMINATION by Mr. Hatch.

Q. John, now as you were proceeding westerly on May 29th or 30th, the day that you had this derailment, did you notice any peculiar sound or foreign sound in the mechanical operation of that locomotive?

Mr. Kelly: Objection. Isn't that a matter for chief?

The Court: Well—

Mr. Hatch: No, it isn't.

The Court: It might be but I don't think there is any particular objection.

Mr. Kelly: Objection.

The Court: Q. Whether you noticed or not. Did you? A. Yes, sir.

Mr. Hatch: Q. All right. Will you tell the jury what you noticed; what called your attention to it?

Mr. Kelly: Object. That certainly is a matter in chief. If he is attempting to deny what someone else said, that is something else.

The Court: Yes. It doesn't rebut anything.

Mr. Hatch: Yes, it does, if Your Honor please. Mr. Gable said he heard nothing, made no stops. I am attempting to rebut that.

The Court: He did hear a sound in the mechanism.

Mr. Hatch: Well, just as he said he applied the brakes.

The Court: That is what he did as a result.

Mr. Hatch: All right. Q. Prior to that time that you got (272) to Rushmore, did you make any stops?

A. Yes, sir.

The Court: Now, he has testified to those before.

Mr. Hatch: Now, wait a minute. Q. Did you hear any peculiar noise before that time? A. Yes, sir.

Q. Where were you on the line between here and Rushmore?

Mr. Kelly: Object.

The Court: That is something that he should have proved in chief. It doesn't rebut this other man at all.

Mr. Hatch: If the Court will let me go into it, I am sure it will.

The Court: Well, come up here. (Attorneys conferring with the Court confidentially.)

Mr. Hatch: Read the question. (Thereupon the Reporter read the last question as shown above.)

A. Hiles. H-i-l-e-s.

Mr. Kelly: Hiles:

Mr. Hatch: Q. Where is that with reference to Rushmore? A. Oh—

Mr. Hatch: Q. Take your hand down so these people can hear you? A. I couldn't exactly say, I would judge right offhand—I would judge around seventy-five mile or a little more.

Q. From Akron or Rushmore? A. Rushmore.

Q. About half way, is that right? A. Somewhere in that neighborhood, around somewhere.

Q. All right. What did you hear?

Mr. Kelly: Now, Your Honor. I must object to this.

Mr. Hatch: We know you object. Let's get it in.

(273) Mr. Kelly: Because you haven't presented your case in the manner provided for by statute. I let my men—my men are back to work. That is the reason we are objecting.

The Court: Now, there is no testimony about any stop—the only thing that was asked was any stop between Columbus Grove and Rushmore.

Mr. Hatch: Between Akron and Rushmore.

The Court: That is what you just asked, but the witnesses weren't asked about any other stops.

Mr. Hatch: Yes, I did.

The Court: That might have made—That wasn't asked of any witness.

Mr. Hatch: I specifically asked the engineer, Mr. Gable. He said yes once when put up the flag.

Mr. Kelly: At the B&O crossing.

Mr. Hatch: I asked whether made any other, he said no.

Mr. Kelly: Now, Mr. Hatch, he said he stopped at Columbus Grove.

Mr. Hatch: But he said he made no other. All right. Now, I am entitled to rebuttal.

Mr. Kelly: Confine it to rebuttal, there will be no objection.

Mr. Hatch: I will if you will just permit me to.

The Court: Well, he has already rebutted, if you want to call it—He said they made another stop in this town called Hiles.

Mr. Hatch: Right. Q. Why did you stop there?

Mr. Kelly: Object.

The Court: Sustained.

(274) Mr. Hatch: (Proffer: Expect the witness to answer that they made a stop because they heard a noise the wheels cutting the rails and that then he informed the engineer Gable of that fact and that the engineer got out to see what the trouble was.)

The Court: You might as well tell the jury, as loud as you talk. You talk too loud.

Mr. Hatch: I would like the witness—I am sorry. I think we are entitled to have the witness tell.

The Court: You were entitled to have the witness tell it all.

Mr. Hatch: I am now in rebuttal.

The Court: Not now you aren't.

Mr. Hatch: Well—

Q. John, I will hand you what has been marked Exhibit 8, which is the purported agreement and release dated June 14, 1944, that has the figure \$139.66. I believe you have testified here that your signature appears there three times? A. Yes, sir.

Q. Now, I also hand you Exhibit Number 7, which is a check for \$139.66, which is dated June 14th, and marked Exhibit 7. Exhibit 6 is a check for \$84.19, dated June 14, 1944, and that is Exhibit 6 there. Exhibit 5 is a list. A. Yes, sir.

Q. —of personal belongings. Now, you got these two checks on or about that date, did you not? A. Yes, sir.

Q. One for \$84.19, to cover your lost clothing? A. Yes, sir.

Q. And the other, \$139.66, was given to you at the same time, wasn't it? A. Yes, sir.

(275) Q. I now hand you again Exhibit 8. Where did you sign that, John? A. Down at Mr. Hochberg's office.

Q. That is in the AC&Y Building? A. Building.

Q. Main office? A. Main office.

Q. All right. Will you tell this jury what was said by you and what was said by Mr. Hochberg at the time you signed that?

Mr. Kelly: Objection.

Mr. Hatch: Q. —Or just prior to that when you went in? Will you tell in your own words what the conversation was between you and Mr. Hochberg?

Mr. Kelly: Objection.

The Court: What is that going to rebut?

Mr. Hatch: If Your Honor please, this was mentioned for the first time in the defendant's case.

The Court: True it was. You could have mentioned it before if you had wanted to.

Mr. Hatch: No, I couldn't.

The Court: Yes, you could.

Mr. Hatch: I tried and the Court said, no, that it is not in the pleadings. I can find that in the record.

The Court: What are you giving? Come up here. You are in rebuttal.

Mr. Hatch: That is right. For the first time that was brought out on cross examination. (Discussion between attorneys and Court confidentially.)

Mr. Hatch: Q. Now, you have Exhibit 8, I believe, in your hand dated June 14, 1944. On that date or on or about (276) that date did Mr. Hochberg tell you that this \$139.66 covered wages only? A. Yes, sir.

Q. And after you signed it he gave you those two checks, is that right? A. Yes, sir.

The Court: Well, was the \$84.00 check given the same date?

Mr. Hatch: Yes, sir.

A. The same day.

The Court: All right.

Mr. Hatch: Q. I hand you what has been marked for identification as Plaintiff's Exhibit 9, now after you started to take this Book of Rules, which is Defendant's Exhibit 27, I believe you testified that you didn't complete it because you became ill, is that right? Now, then, did you get this Exhibit Number 9—where did you get that? A. I got that from Dr. Schaffner.

Q. That is addressed to Mr. F. F. Lynch, is it not?

A. Yes, sir.

Q. And did you give that to Mr. Lentz? A. Yes, sir.

Q. But is that directed to the same person? A. Yes.

The Court: Got his name spelled wrong.

Mr. Hatch: Q. You got that from Dr. Schaffner?

A. Yes, sir.

Q. It says—

Mr. Kelly: Wait a minute. Object.

Mr. Hatch: May I read it to the jury?

Mr. Kelly: No.

The Court: Not in evidence, is it?

(277) Mr. Kelly: Objection.

The Court: It is not in evidence.

Mr. Hatch: I am going to offer it later.

The Court: Later?

Mr. Hatch: This is rebuttal, Your Honor.

Mr. Kelly: Rebuttal of what?

Mr. Hatch: On your cross examination, all with reference to this examination.

The Court: Well—

Mr. Hatch: It is proper rebuttal, if Your Honor please.

Mr. Kelly: What does it rebut, Mr. Hatch?

Mr. Hatch: The testimony that he gave on cross examination with reference to that examination.

Mr. Kelly: What he was asked, if this was given to him if that was his writing, he said yes. That is all.

Mr. Hatch: He was asked why he did not.

Mr. Kelly: I didn't ask him why.

Mr. Hatch: Yes, you did.

The Court: I don't remember asking why.

Mr. Kelly: Wouldn't be proper anyway.

Mr. Hatch: It is in the record. My notes indicate that is in the record; said he didn't finish it because he became ill, and here's the Doctor's statement.

The Court: I don't remember him saying it.

Mr. Hatch: I do. It is in my notes. We can go back through the notes if you wish.

The Court: Did he say that in chief?

Mr. Hatch: No.

(278) The Court: Well, let's go back in the notes.

Mr. Hatch: O.K.

The Court: I don't remember. (Reporter looking back in the record—page 213 of this record, also pages 79, 143.)

The Court: Sustained.

Mr. Hatch: (Proffer: Except and expect the witness to testify that he took that Exhibit to Mr. Lentz.)

Mr. Hatch: Marking Plaintiff's Exhibit 10.

The Court: Do you want it in the record, be done with it? I will sustain it.

Mr. Hatch: Q. I hand you Plaintiff's Exhibit 10, and ask you if that is not a letter you received from Mr. Lentz? A. Yes, sir.

Q. On or about May 6, 1947? A. Yes, sir.

Mr. Hatch: I will offer that in evidence.

Mr. Kelly: Objection.

The Court: Sustained.

Mr. Hatch: Exception. We are offering Exhibit Number 10 for the purpose of rebuttal with reference to the Company's Book of Rules. With reference to the taking the examination for engineman.—I believe that is all.

The Court: You rest.

Mr. Hatch: We reoffer those exhibits.

(Which said further exhibits not already in the record are Plaintiff's Exhibits 8, 9 and 10, which are hereto attached and made a part of this Bill of Exceptions.)

The Court: I think you have offered everything. Everything has been passed on.

(279) Mr. Hatch: Just to save the record, if we have overlooked anything.

The Court: I think all the exhibits if admitted have already been received.

And the above and foregoing, together with the exhibits hereto attached, were all the testimony, evidence and exhibits given or offered to be given on the trial of the above entitled cause.

The Court: Now, how long do you want to argue?

Mr. Kelly: Whatever Your Honor thinks proper.

(Attorneys conferring with the Court confidentially.)

The Court: All right. Now, Members of the Jury, you have heard all of the testimony in this case. You still have to hear arguments of counsel and the charge of the Court. In order that this may all be done simultaneously, we will adjourn at this time and you will not form any opinion in this matter and not talk or discuss this case with anyone during that period of time. We will begin this afternoon at one o'clock sharp. You are now excused until that time.

Thereupon the jury were excused from the Courtroom.

Mr. Kelly: At the conclusion of all the evidence, defendant renews its motion made at the conclusion of plaintiff's evidence, again moves that all the evidence be withdrawn from the consideration of the jury and that the jury be instructed to return a verdict for and on behalf of the defendant.

Thereupon the attorneys for defendant and for the (280) plaintiff argued said motion before the Court.

The Court: Motion overruled.

Mr. Kelly: Exception.

And thereupon Court adjourned until one o'clock P. M. October 18, A. D. 1949, at which time Court hav-

ing convened pursuant to adjournment, the trial of said case proceeded as follows:

And thereupon the defendant submitted to the Court in writing the following request to charge, which it requested in writing that the Court give to the jury before argument, which said request, together with the Court's ruling thereon, were as follows, to-wit:

"The court says to you as a matter of law that since Plaintiff admits that he signed the 'agreement and release' of September 5, 1944 (Exhibit 6), this gives rise to the presumption that he understood its terms and provisions."

Which request the Court gave to the Jury as follows:

The Court: I have been requested to give you a proposition of law before you hear the arguments of counsel in this case. I will read to you now this proposition of law and you will have it with you in the jury-room and you may read it in the juryroom. You may take this proposition of law which I now read to you as the law in this case, together with the general charge which the Court will give you after the arguments of counsel.

The Court says to you as a matter of law that since Plaintiff admits that he signed the "agreement and release" (281) of September 5, 1944 (Exhibit 6), this gives rise to the presumption that he understood its terms and provisions.

(To the giving of which charge the plaintiff then and there excepted.)

Mr. Hatch: If Your Honor please, I was just handed a copy of that request about two minutes ago.

The Court: Well, I have given it.

Mr. Hatch: I want for the record, I want to say that I object.

The Court: Take your exception.

Mr. Hatch: Because I don't believe it covers that, the whole presumption—should further instruct that can be overcome.

The Court: I think it is proper law. I have given it. We will now proceed with the argument. You will have a half-hour for opening argument.

And thereupon Counsel for plaintiff and defendant argued said case to the Jury.

The Court: Ladies and gentlemen of the jury—Maybe you had better have a five minute recess. No longer.

Recess.

— (In the Court's chambers, jury not present.)

Mr. Kelly: At the conclusion of all the arguments and before the general charge of the jury the defendant AC&Y Railroad Company requests the Court to instruct the jurors if they render a general verdict to especially find or submit an evidence of said finding to be:

(282) "Number 1.

If you find in favor of the plaintiff on the issue with respect to the validity of the 'agreement and release' of September 5, 1944 (Defendant's Exhibit 6), then state and describe the act or acts of defendant, upon which you base such finding.

## Number 2.

Did plaintiff have an opportunity to read the 'agreement and release' of September 5, 1944 (Exhibit 6) prior to or at the time he received a check for \$475.78?

## Number 3.

Did plaintiff have an opportunity to read the bank check of September 5, 1944, for \$475.78 (Exhibit 12) between the time he received said check and the time he received payment therefor?

## Number 4.

Was plaintiff prevented from reading the 'agreement and release' of September 5, 1944?

## Number 5.

If your answer to question number 4 is yes, then state in what manner he was so prevented.

## Number 6.

If you find by a preponderance of the evidence that plaintiff was injured on May 29, 1944, and that such injury resulted in whole or in part from the negligence of any of the officers, agents, or employees of defendant, then state of what such negligence consisted.

## Number 7.

If you find by a preponderance of the evidence that (283) plaintiff was injured on May 29, 1944, and that such injury was by reason of any defect or insufficiency due to the negligence of defendant in its cars, engines,

appliances, machinery, track, roadbed, works, or other equipment, then name and describe such defect or insufficiency."

The Court: Is that your copy you are reading from?

Mr. Kelly: That is my copy.

The Court: All right.

Mr. Hatch: Objection.

The Court: You are just objecting?

Mr. Hatch: To them as a group and individually, one to seven.

The Court: All right. Have you anything particularly you want to call the Court's attention to?

Mr. Hatch: I think, Your Honor, as to number one that that question does not involve all the elements not only with respect to the validity but to the interpretation of the meaning of the so-called agreement and release, that Exhibit 6. If that were—

The Court: Well, we will give it and consider it later. I think it is all right or I wouldn't give it.

Mr. Hatch: Object.

The Court: If there was a doubt in my mind, I wouldn't give it. All right. We will call the jury.

And thereupon the jury were called into the Courtroom.

Whereupon the Court charged the jury as follows:

(284) The Court: Members of the Jury—

It now becomes the duty of the Court to charge you upon the law and the issues in this case. You are the sole judges and triers of fact in this case.

It is the duty of the Court to give you the law and it is your duty to take the law as given to you by the

Court and apply it to the facts as you find those facts to be.

It is your duty to arrive at a verdict without being influenced by any feeling of sympathy or passion or prejudice.

The arguments of counsel which you have just heard and anything that was said during the trial by the Court or counsel are not evidence. The evidence consists of the sworn testimony of the witnesses from the witness stand together with the numerous exhibits which have been received in evidence and which will be with you in the jury room.

The arguments of counsel which you have just heard are to enable you to better understand the issues in this case and to facilitate your deliberations upon the facts in this case.

Now, this suit is brought under favor of what is generally known as the Federal Liability Law, an Act passed by the Congress of the United States relating to the liability of common carriers by railroad to their employees in certain conditions.

The pertinent portions of the law provide that every common carrier by railroad while engaged in commerce between the several States shall be liable in damages to any person suffering injury while he is employed by such carrier in such (285) commerce in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to negligence in its cars, engines, appliances, machinery, track, roadbed or other equipment.

The plaintiff claims that while he was a fireman for the defendant company on the 29th day of May, 1944, and

while making a run westerly as a fireman on board Engine Number 404 hauling ten freight cars to Delphos, Ohio, and along the defendant's track, that when he reached a point near Rushmore, Ohio, at a switch going into a siding, known as the "beet switch," suddenly and without warning to the plaintiff the engine was negligently caused to jump the track pulling the engine to the left half way around headed east and turning said engine on its right side.

Plaintiff says that as a direct result of the occurrence and by reason of the negligence of the defendant he received injuries which he and his witnesses have testified to. Plaintiff claims that he has lost employment, and that since April 24th, 1947 he has been unable to perform any of his duties for the defendant and has been informed and therefore alleges the fact to be that he will be unable to perform his duties as a fireman or as an engineer.

Plaintiff further says by reason of the aforesaid injuries he has incurred expenses for medical treatment or X-rays in the sum of \$200 and he has been informed and therefore believes that he will have further expense by reason of said injuries and prays judgment against the defendant in this case (286) in the sum of \$50,200.

To this claim of the plaintiff the defendant has filed an answer wherein in its first defense the Company admits that at the time of the occurrence set forth in the Petition that the plaintiff and the defendant were both engaged in interstate commerce and that the plaintiff at that time was the employe of the defendant as a fireman and was so engaged and aboard engine number 404 on the date in question; further admits that on the 29th day of

May the locomotive attached to a train of freight cars was traveling in a westerly direction from Akron to Delphos on defendant's tracks, and that at a point near Rushmore, Ohio, the locomotive left the track and that as a result thereof plaintiff sustained some injuries; but denies that the plaintiff on the occasion received injuries to the extent in the Petition alleged but on the contrary avers that such injuries were not of a serious nature. And further answering the defendant denies each and every allegation and statement contained in the Petition not hereinbefore specifically admitted to be true, and defendant says that it was guilty of no negligence in the premises and is indebted to the plaintiff in no sum whatever.

Now, the defendant sets up a second defense and says that without admitting negligence on its part and for the purpose of avoiding litigation, this defendant made a full and complete settlement with the plaintiff for any and all injuries which plaintiff received by reason of the accident set forth in the petition, and that as a consideration for the release the defendant paid to the plaintiff the sum of \$924.63 and (287) as evidence of said full and complete settlement and release of the defendant on the part of the plaintiff for any and all injuries which the plaintiff received on the occasion plaintiff and defendant entered into a written agreement and release under date of September 5th, 1944.

Defendant says that the above agreement and release constitutes a full and complete settlement and release of any and all claims of the plaintiff claimed in his Petition.

To this Answer of the defendant, the plaintiff by way of Reply to the second defense denies that the defendant

made a full and complete settlement with the plaintiff for any and all injuries which the plaintiff received by reason of the occurrence in question.

Plaintiff admits that in September, 1944, he received some money from the defendant but denies that the receipt thereof constituted a full and complete settlement of all his claims. Plaintiff says that in September, 1944, when he reported back to work one A. W. Hochberg, Chief Clerk for the defendant company, informed him that it would be necessary to sign a paper releasing the defendant company from all claims for loss of time and medical expenses up to the time before he could go back to work, and that he relied on said promises and representation.

Plaintiff further says that at the time of the execution of the purported release that Mr. Hochberg represented to this plaintiff that the release was a release only for wages lost by the plaintiff to the defendant hereof by reason of his being unable to work by reason of injuries he had sustained on (288) or about May 29, 1944, and that said representation was false, fraudulent and was relied on by the plaintiff. Plaintiff says that all of said representations of the defendant company by and through their Chief Clerk were false and fraudulent, made with the express purpose and for the intent of defrauding plaintiff, by reason thereof the release is null and void.

Plaintiff further says that he has tendered to the defendant company the sum of \$924.63 which tender was refused and he prays that the said purported release be held null and void and of no legal effect.

It is thus that the issues are made between the parties from the pleadings in this case, which consist of the

Petition, the Answer setting up two defenses, and the Amended Reply.

Now, you have presented by the Petition the claim made by the plaintiff of negligence against the defendant, and the defendant denying that and also setting forth another defense. Now it is logical for you to consider, first, the affirmative claims made by the plaintiff in his Second Amended Reply to the Answer of the defendant for the reason that the defendant sets up in its Answer that there was a contract made between the plaintiff and the defendant whereby the plaintiff released all his claims against the defendant.

It will be noted in the Reply of the plaintiff that he admits the signing of and the execution of this release or this contract, the delivery thereof, and the fact that he received \$924.63.

Upon the subject matter of the release as a defense does not negative the plaintiff's cause of action but is a bar (289) to a judgment upon it, and the burden of proof to establish it is upon the defendant. But there is a distinction between the burden of proof and the burden of evidence.

When the plaintiff admitted the receipt of \$924.63, his signature to the release and its delivery to the defendant, the defendant had made what we call in the law a prima facie case. That is, the Company had established this defense and at that point in the trial the burden is cast upon the plaintiff to establish his claim of fraud against the defendant-company by clear and convincing evidence that the release executed by him to the defendant was fraudulent.

The plaintiff in his second Amended Reply asserts that his signature to this release was obtained by fraud

or fraudulent representations made by the defendant through its agent.

Now, this issue with reference to the release is, as I have said, presented by the Second Amended Reply, and which as I have said before you should logically take up first and determine under the law and the evidence submitted to you here in open Court.

Now, the plaintiff claims that he was informed by Mr. Hochberg that it would be necessary to sign a paper releasing the Company from all claims for loss of time and medical expense up to the date before he could go back to work and he further claims that Mr. Hochberg represented to him that the release that he was signing was only for the wages lost by the plaintiff to the date thereof by reason of his being unable to work.

Now, those are the representations,—those two things. (230) There are no other representations claimed in this case.

And plaintiff claims that these two representations were false and fraudulent and made for the express purpose and intent of defrauding the plaintiff, and he relied upon said representations so fraudulently made to this plaintiff to the plaintiff's damage.

So, therefore, before you consider the petition's claim in compensation for damages upon the question of negligence or the non-negligence as presented therein, you must first consider affirmatively whether or not a fraud was perpetrated by the defendant, and that the release he signed was void and if you find there was fraud and it was void you then consider the questions of negligence as presented by the Petition and Answer. But if you find there was no fraud perpetrated you need go no further in this lawsuit and your verdict should be

for the defendant. If you find that fraud was perpetrated it vitiates the release set up in the Answer by the defendant and it is void and it is of no effect as if it had never been written and they attempted no contractual relation. Then you go on, as I said, to the question of negligence.

Now, as I have heretofore said, the plaintiff having admitted that he signed the instrument and received the money and delivered the release to the defendant and the release having been offered in evidence, the defendant has established a prima facie defense to the plaintiff's Petition.

Now, what do we mean by a prima facie defense? A prima facie defense is a legal term often used by the Courts,—is such a defense as will prevail in this lawsuit if not rebutted (291) or disproved. So that on the presentation of this release signed by the plaintiff the defendant has presented a prima facie case or defense and the plaintiff must come forward on his own affirmative claim that it was obtained by fraud, and establish fraud, if any, by evidence clear and convincing to a jury that the release was obtained by fraud.

Now, fraud is any deception or trick or unfair means used to cheat another. The essence of a fraudulent transaction is bad faith. But I charge you that the law presumes that all men are fair and honest and that their dealings are in good faith and without any intention to cheat or defraud. The law abhors fraud and when a transaction called in question is susceptible of two constructions, one that is fair and honest and one that is dishonest, the law is that the fair and honest construction must prevail and the transaction in question, that is, the

transaction in this suit must be as a matter of law presumed to have been fair. Fraud, therefore, is never presumed; except that the law presumes that a person intends the natural results of his acts, and the burden is upon him who alleges fraud to prove it. Thus, fraud may be proven by circumstances from which the inference of fraud is natural and clear.

Now, what are the elements that the plaintiff must prove to establish fraud by clear and convincing evidence to you? First, the plaintiff must establish that there is an actual or implied representation or concealment of a matter of fact which relates to the present or the past and which is material to the transaction;

Second, the misrepresentation must be false;

(292) Third, the representation must be made with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred;

Fourth, it must be made with the intent of misleading another into relying upon it; and

Fifth, the other person must have relied upon it with the right to so rely; and

Sixth, injury must have resulted as a consequence of such reliance.

Now, the party asserting the falsehood must at the time intend to deceive. Fraud usually consists in intention. Falsehood must not only be in something material but it must be in something in regard to which the one party places a confidence in the other. For if the falsehood be of such a nature that the party deceived by it had no right to place reliance upon it and it was his own

folly in consequence of his not exercising common sense and ordinary discretion, he cannot maintain an action for the injury.

And it must be made with the intention of misleading another into relying upon it, that is, it must be intended to operate upon the party complaining that is the plaintiff; and that it was intended to operate upon this plaintiff to execute this release. And the party complaining of a deceit must be misled by the falsehood, for if he knows the assertion to be false when made it cannot be said to influence his conduct, that is, if he knew it was false when it was made. And the falsehood must constitute an inducement or motive to the act of or omission of the party deceived and he must be (293) deceived or misled to his injury; that is, to his injury in that the signing of the purported release as claimed by the plaintiff in his Amended Reply had for its purpose a release beyond which he claims was discussed and understood between him and Hochberg. That it was something more than was discussed and understood between the parties just prior to the execution of the release.

Therefore, you will consider whether or not Hochberg represented or said to this plaintiff that it would be necessary to sign a paper releasing the defendant company from all claims for loss of time and medical expenses up to date before he could go back to work; and you must further consider whether or not the defendant represented by Hochberg that the purported release was a release only for wages lost by the plaintiff to the date thereof. You must further consider that these representations were made with the intent to deceive and that they were false and that the plaintiff in

this case relied upon it, the representations, and lastly that he was induced and did sign the release because of the representations.

In considering these questions of fraud, you have a right to consider all of the facts and surrounding circumstances with reference to the parties in this case. You have a right to consider all of the several documents and receipts and checks as bearing upon the question of the knowledge of the parties with reference to the situation before the execution of the release, but the question of the adequacy or the inadequacy of the consideration, of the amount paid, because of the ignorance if there be any, of the parties of the true situation are questions (294) that you are not called upon to consider in this lawsuit.

So, if the plaintiff knew that he was releasing the Company from the only claim that he supposed he had against the Company for the injury that he supposed that he had received, such release is valid in law, and is a bar to recovery in this case although he discovered afterwards that he received more serious injuries than he supposed when he signed the release, and he is merely concluding now that he should have received a larger compensation or settlement instead of the settlement that he did receive.

So, therefore, if you find that the plaintiff has failed to establish fraud by the evidence required, that is, clear and convincing evidence, then your verdict in this case would be for the defendant.

But if you find from the evidence that the release was perpetrated by fraud upon this plaintiff, then the paper has no effect and is void. And if you find there

was fraud perpetrated, and that the release and contract were void, you go to the next question.

And upon the question of negligence, which the plaintiff claims in his Petition, it is the duty of the plaintiff to establish by a preponderance of the evidence that the derailment of the train resulted proximately from the negligence of the defendant railroad company. That is, the plaintiff must establish by a preponderance of the evidence that some act of negligence upon the part of the railroad was the proximate cause of the accident or derailment in this case and the resulting injury to the plaintiff.

(295) And by the proximate cause is meant the act or failure to act which directly or immediately or efficiently brings about the collision or in this case the derailment and the resulting injury.

Negligence is not presumed. It is a fact to be proven like any other fact. Nor the fact that the plaintiff may have suffered an injury at the time and place raises no presumption of negligence against the defendant company.

The burden is upon the plaintiff to establish what he claims as being the negligence of the defendant and the damage resulting from that negligence by a preponderance of the evidence, and by a preponderance of the evidence we mean the greater weight thereof, the greater probability of the truth as you see it to be after weighing the evidence.

And you will note that I tell you now that upon the allegations of the petition with reference to negligence it was the duty of the plaintiff to establish that negligence by the greater weight or the preponderance of the evi-

dence; whereas with reference to the release I told you the burden was upon the plaintiff to establish it by a higher degree of evidence, to-wit: clear and convincing evidence. There is that distinction there.

I tell you that so that you may realize why we use different terms.

In your consideration of the facts in this case, it will be necessary for you to determine the credibility of the witnesses who have testified and in so doing you will take into account their relationship to the parties in this case if there (296) be any; their interest, if any, in the outcome of this case; the intelligence of the witnesses or their lack of it; the means of observation which the witnesses show concerning the things about which they testified; their memory of the events concerning which they have testified; their candor and frankness upon the witness stand or their lack of it, and any other matters or things disclosed during the taking of the testimony which would give you any aid or assistance in determining the credibility and in arriving at the weight which you will give to their testimony respectively.

It was the duty of the defendant to exercise ordinary care in providing a reasonably safe place to work, and it was the duty of the defendant to keep its equipment and instrumentalities in a reasonably safe condition commensurate with the practical operation of its business.

The Company is not an insurer of plaintiff's safety. The plaintiff is required to exercise ordinary care.

Mr. Kelly: You mean, the defendant.

The Court: —The company, yes, the defendant. No, I said the Company. I will say the defendant. That is, it is required to exercise that care which prudent men

would exercise under the same or similar circumstances in the control and management of that kind of a business commensurate with the practical operation thereof. No railroad can be run without accidents. Accidents will happen. And if a railroad were run completely without accidents, the cost of an operation would be such that nobody could be in the railroad business. That is why the law says that they must exercise ordinary care (297) to provide a reasonably safe place to work, and that they are not insurers of the safety of the plaintiff.

Now, when the instrumentality causing injury is under the exclusive management and control of a defendant and the accident occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed, then I instruct you that an inference of negligence arises for the consideration of a jury.

It is an inference of negligence which the jury is permitted to draw. The jury may infer from the happening of an accident, or specifically: a derailment, that the happening was due to negligence. That is, they can draw such an inference if it is to be fairly drawn from all the facts and circumstances surrounding the derailment. This is what we call an allowable inference under the doctrine of *res ipsa loquitur*, which inference is rebuttable. The term *res ipsa loquitur*, a Latin term, translated means the thing speaks for itself. And since it is rebuttable, it is permitted for evidence to be offered by the Company to show the degree of care which it actually used under the circumstances as shown by the evidence.

The law attaches no special weight as proof to the fact of an accident, but simply holds it to be sufficient for the consideration of a jury.

The defendant is not obliged to explain how the derailment happened or there is no presumption of negligence which the defendant has to overcome by proof. The defendant is not obliged to explain or show the cause of the derailment, but only to go forward with proof that it had exercised due care to (298) furnish safe equipment and operate the trains with due care over a properly maintained roadbed at the time and place.

Therefore, the weight of the inference as well as the weight of the explanation is for the determination of the jury. However, this rule does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor, and the rule still prevails that the plaintiff in this case will not be entitled to a verdict upon this question of claimed negligence unless he establishes by a preponderance or greater weight of the evidence that the derailment was caused by the negligence of the defendant and the proximate cause of the derailment and his injury was the negligence of the defendant.

If after the consideration of the evidence with reference to the release in question you determine by clear and convincing evidence that the release is void and you further determine by a preponderance of the evidence or the greater weight thereof that the defendant was negligent upon the day in question and that such negligence directly or proximately caused the derailment of the train and plaintiff's resulting injuries, then it will be your duty to consider the nature and extent of the plaintiff's injuries, if any. In other words, it will be your duty to consider the damages that the plaintiff is entitled to in this case.

It is a part of the duty of the trial judge to charge you on the law of damages but because I charge you with

reference to damages you have no right to infer that the Court is of the opinion that one side or the other should prevail in (299) this lawsuit.

It is just a part of the duty to charge you upon the law of damages.

If you find under these instructions for the plaintiff, it will be necessary for you to determine the amount which you find he is entitled to recover; and if you find for the plaintiff it will be your duty to award him such sum in damages as will fairly, fully but not extravagantly compensate him for the damages found to be sustained by him. And in so doing you will consider the nature, the extent and the character of the injuries and the pain and suffering he has endured, if any. You may consider the reasonable and fair value of the hospital or doctor bills, if any are shown by the evidence. You may consider the loss of employment, by reason of disability, with the railroad company, if any.

Plaintiff claims that he has suffered an impairment of earning capacity. The Court says to you that in considering the matter of damages for loss of such earnings, which may or may not occur in the future, that you have no right to allow damages for loss of earnings in the future unless it is shown by the evidence to be reasonably certain to occur in the future and in determining such an amount you can only award the present value of such amount as you find from the evidence to be reasonably certain to occur. Upon the matter of earnings, the measure of damages for impairment of earning capacity is the difference of the amount which the plaintiff was capable of earning before the injuries and that which he was capable of earning thereafter; and this impairment

must be shown by (300) evidence with reasonable certainty and an award cannot be made for mere conjecture but must be shown by the evidence.

And an award for impaired earning capacity cannot be allowed under the evidence in this case unless you find by the greater weight thereof that the disabling condition of the plaintiff today, if any, was directly and proximately caused by the occurrence which happened on May 29, 1944.

The evidence as to damages, that is, as to the nature, the character and the extent of the injuries, as other evidence in this case must preponderate in favor of the plaintiff as to the nature and the character and the extent of these injuries. In other words, these injuries must be shown to you by a preponderance of the evidence or greater weight.

Now, you will have with you in the juryroom two forms of verdict. One is headed "Verdict for the plaintiff," and one headed "Verdict for the defendant."

If your verdict is for the defendant it will be necessary for nine or more members of the jury to sign the verdict and return it to the Court. In a case of this kind, it is necessary for three-fourths of the jury, which would be nine or more, to concur in a verdict: and when that nine or more of you have concurred in a verdict, whether it be for the plaintiff or the defendant, you sign it at the place provided and return it to the Court.

Now, if your verdict is for the plaintiff, you will in addition thereto fix the amount that you find the plaintiff is entitled to recover in damages in dollars and cents. You fix the amount in the place provided in the verdict and sign (301) it, also.

These two forms, which I have just discussed, are what are called general verdict forms.

Now, if you enter into a general verdict, that is, in the event that you arrive at a general verdict, either for the plaintiff or the defendant, you will in addition thereto have to answer certain questions which have been enumerated here, and you will note upon each one of them it says "Question," and it says "Answer." You will write in your answers and then you will find lines provided for the members of the jury who are answering these questions, who are making the answer, to sign. And nine or more of you should sign these interrogatories or questions, the same as you do the general verdict. There are here seven questions.

Now, remember, where it says "Answer," you write in your answer and then you sign it.

And these interrogatories,—we call them interrogatories in the law, these seven interrogatories are to be answered in the event that you arrive at a verdict in this case either for the plaintiff or for the defendant, and when you do so arrive at a verdict, if you do, you fill out that verdict first.

Is there anything that I have overlooked? (To attorneys.) Is there anything further for the plaintiff?

I did overlook the fact that it is customary for the jurors to elect one of your members foreman to act as your presiding officer during your deliberations. The foreman has no more power than anyone else in the jury but it is customary (302) to elect a foreman to facilitate your deliberations in a case.

I want to say again that there is a proposition of law which I gave you before argument that will be with you

in the juryroom, and all of these several exhibits will be with you in the juryroom for your study and examination, and I further say to you that they are evidence in this case, these exhibits.

The Court: Anything further for the plaintiff?

(Thereupon the plaintiff's attorney went to the Court's bench and talked confidentially with the Court, part of which conversation was as follows: "Mr. Hatch: If the Court please, I think you should have gone further in this question of *res ipsa loquitur*, on the defendant to explain away that inference." To which the Court replied in part, "I told them that specifically. . . . I don't think I can improve upon it. Anything further?")

Mr. Hatch: Object. (For the record I want to object to these special instructions.)

Mr. Kelly: Nothing further on behalf of defendant.

The Court: All right. (To jury.) It is yours. You will now be in charge of the Bailiff of this Court.

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And thereupon the jury were excused from the Courtroom.

Mr. Hatch: Plaintiff objects to the charge of the Court generally and specifically to each and every part thereof.

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Mr. Kelly: On the general charge, defendant objects and excepts to each and every part thereof.

(303) And thereafter at approximately 4:07 P. M. after the usual admonition by the Court to the jury, Court adjourned until nine o'clock A. M., October 19th, A. D. 1949, at which time Court having convened pur-

suant to adjournment, the trial of said case proceeded as follows:

Thereupon the jury again retired to deliberate further upon said case and thereafter at approximately 11:50 A. M., the said jury were returned to the Courtroom at which time the Court asked the jury:

The Court: Well, are you having some trouble? You haven't arrived at a verdict yet?

Foreman of the Jury: Not quite.

The Court: All right. At this time you will be excused for lunch. Come back at one o'clock.

Thereupon after the usual admonition by the Court to the jury, Court adjourned until 1:00 on said day, at which time the Court having convened pursuant to adjournment, the said jury again retired to deliberate further upon said case.

And thereafter at approximately 3:00 P. M., the jury were again returned to the Courtroom, whereupon the Court said:

The Court: I wonder if we hadn't ought to have the lawyers up here?

The Bailiff: They didn't leave any request that they should be notified. I can call them.

The Court: You had better, both of them.

Thereupon the Bailiff left the room to call the attorneys.

The Court: (To Foreman of the jury.) This one question (304) wasn't answered at all. Did you notice that?

Foreman of the Jury: Yes.

The Bailiff: Both of them will be here.

The Court: (To jury.) Just be at ease until they get here.

Thereafter the attorney for the plaintiff and the attorney for the defendant appeared in the Courtroom, whereupon the Judge read aloud the Verdict.

The Court: Signed by ten members of the jury.

The Court: Did you sign this in rotation, one, two, three—

Foreman of the Jury: No.

The Court: All right. Is this the verdict of the jury as I have read it?

Foreman of the Jury: Yes, sir.

The Court: You are the Foreman? Is this the verdict of the jury as I have read it?

Foreman of the Jury: Yes, sir, Your Honor.

The Court: All right. Counsel having indicated that they will not insist upon the jury answering question number seven, we will accept the verdict and the interrogatories as they are answered, and you are excused.

Thereupon the jury was excused.

Mr. Kelly: Now comes the defendant and immediately upon the rendition of the verdict of the jury herein announces that it desires to file a written Motion for Judgment Notwithstanding the Verdict, and advises the Court that said written motion will be filed not later than two days from the date (305) hereof and asks the Court to withhold the giving of any judgment until the defendant has an opportunity to so prepare and file its Motion for Judgment Notwithstanding the Verdict.

Mr. Hatch: Object and except to the Court's ruling adversely.

And thereupon Court adjourned.

And thereupon the Jury after due deliberation and on said 19th day of October, A. D. 1949, returned a verdict in favor of the plaintiff and against the defendant, as more fully appears of record herein.

And thereupon and within three days after the rendition of the verdict in this case, to-wit, on the 20th day of October, A. D. 1949 came the defendant and filed its Motion for Judgment Notwithstanding the Verdict and also Motion for Judgment on Special Finding of Fact, which motions were argued by counsel and submitted to the Court; on consideration thereof on the 23rd day of February A. D. 1950 the Court sustained defendant's Motion for Judgment Notwithstanding the Verdict and overruled Defendant's Motion for Judgment on Special Finding of Fact, and to which rulings of the Court the plaintiff then and there excepted to the granting of defendant's Motion for Judgment Notwithstanding the Verdict, and defendant then and there excepted to the Court's ruling on its Motion for Judgment on Special Finding of Fact.

And thereupon on the 23rd day of February A. D. 1950 being within forty days after the rulings of the Court the plaintiff filed with the Clerk of said Court this, his Bill of Exceptions in said cause, and prayed that the same might be (306) allowed and signed by the Trial Judge and filed as a part of the record in this case, but not spread at large upon the journal, according to the statute in such case made and provided.

And thereupon the Clerk of said Court forthwith notified the adverse party of the filing of said Bill of Exceptions.

And thereupon, on the 6th day of March A. D. 1950 at a time not less than ten nor more than fifteen days after forty days from the sustaining of Plaintiff's Motion for Judgment Notwithstanding the Verdict this Bill of Exceptions is duly transmitted to the Trial Judge by the Clerk of said Court, together with all objections and amendments filed thereto, the receipt of which is hereby acknowledged.

FRANK H. HARVEY,

*Trial Judge.*

And now, upon this ..... day of ..... A. D., 19.. being not more than five days after the receipt of said Bill of Exceptions from said Clerk, and upon due consideration of the same and the objections and amendments thereto, said Bill of Exceptions is hereby allowed and signed by the Court and ordered to be filed as a part of the record herein, but not to be spread at large upon the Journal, according to the statute in such case made and provided, all as of the aforesaid term of this Court.

FRANK H. HARVEY,

*Trial Judge and Judge of said Court.*

**TRANSCRIPT OF DOCKET AND JOURNAL  
ENTRIES.**

**To Supreme Court.**

No. 4095.

**COURT OF APPEALS OF SUMMIT COUNTY, OHIO.**

**JOHN F. DICE,**

*Appellee,*

**vs.**

**THE AKRON, CANTON & YOUNGSTOWN RAILROAD CO.,  
A CORPORATION,**

*Appellant.*

Transcript from Common Pleas Court with Original Papers filed February 24, 1950 in Court of Appeals.

March 16, 1950. Supplemental Transcript with Bill of Exceptions filed.

April 12, 1950. Journal Entry filed. February Term. For good cause shown, Appellant, John F. Dice, is hereby granted leave to file his assignment of errors and brief on or before May 6th, 1950. P. H. STEVENS, *Presiding Judge.* JL. 11-36.

May 5, 1950. Brief of Plaintiff-Appellant (3) and Assignment of Error filed.

June 15, 1950. Brief of Defendant-Appellee and Receipt (3) filed.

September 11, 1950. February 1950 Term continued to September 1950 Term.

September 11, 1950. Journal Entry filed. Judgment Reversed and Cause Remanded. September Term.

The said parties appeared by their Attorneys, and this cause came on to be heard upon the Notice of Appeal of the said John F. Dice, Appellant herein, together with a transcript of the docket or journal entries of the Court of Common Pleas of Summit County, Ohio, and such original papers, or transcripts thereof, as were necessary for said appeal, filed therewith in the said Court wherein John F. Dice was Plaintiff and The Akron, Canton & Youngstown Railroad Company was Defendant, mentioned and referred to in said Notice of Appeal, and was argued by counsel: Upon consideration whereof, the Court finds that in the record and proceedings aforesaid, there is error manifest upon the face of the Record to the prejudice of the Appellant, in this, to-wit: In that the Court of Common Pleas of Summit County, Ohio entered judgment for the defendant-appellee, notwithstanding the jury's verdict for the plaintiff-appellant. IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THIS COURT, that the Judgment and Proceedings of the said Court of Common Pleas, in said cause in favor of the said Appellee and against the said Appellant be, and the same hereby are, set aside, reversed and held for naught, and that the said Appellant be restored to all things which he lost by occasion of said Judgment: THAT the said action be, and it hereby is, remanded to said Court of Common Pleas of Summit County, Ohio, to be proceeded in according to law, and the rights of said parties; with instructions to enter judgment for the plaintiff-appellant on the verdict returned in the sum of \$25,000.00. THAT the said Appellee pay the costs of this proceeding, taxed at \$. . . . . and in default thereof that an execution issue therefor; and THAT a Special Mandate

and Writ of Procedendo be sent to the said Court of Common Pleas, to carry this Judgment into execution. To all of which Appellee excepts. OSCAR HUNSICKER, *Judge for the Court.* JL. 11-89.

September 11, 1950. Special Mandate sent to Common Pleas Court. Verne T. Bender, Clerk. E. L. Stone, Deputy.

September 28, 1950. Notice of Appeal of Defendant and Receipt filed.

(Duly certified.)

[fol. 315] THE SUPREME COURT OF OHIO, JANUARY TERM,  
1950

Title of Case

JOHN F. DICE, Plaintiff-Appellee,

v.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY,  
Defendant-Appellant

DOCKET AND JOURNAL ENTRIES

Sep. 28, 1950. Notice of Appeal and proof of service filed.

Sep. 29, 1950. Motion for an order to certify record. Assignments of Error, appellant's printed brief on motion and proof of service filed.

Oct. 11, 1950. Appellee's printed brief filed. 10/13/50 proof of service filed.

Dec. 16, 1950. Motion for an order directing the Court of Appeals of Summit County to certify its record allowed. J. 39—601.

Dec. 16, 1950. Order #2654 issued to Clerk of Courts to certify record.

Dec. 22, 1950. Assignments of error refiled.

Dec. 22, 1950. Court of Appeals transcript, original papers and bill of exceptions filed.

[fol. 316] Dec. 22, 1950. Cause docketed on its merits.

Dec. 26, 1950. Assignments of error and proof of service filed.

Jan. 2, 1951. Stipulation of counsel, approved and filed.

Jan. 19, 1951. Entry extending time for filing printed record to Jan. 29, 1951. E. S. Matthias, J. J. 39—632.

Jan. 24, 1951. Appellant's printed brief on motion refiled and proof of service filed.

Jan. 25, 1951. Appellee's printed brief on motion refiled and proof of service filed.

Jan. 26, 1951. Printed record filed. 1/29/51 proof of service filed.

Feb. 15, 1951. Additional authorities of appellant filed.

Feb. 24, 1951. Printer's receipted bill filed.

Mar. 28, 1951. Judgment reversed and cause remanded to Court of Appeals. J. 39—683.

Apr. 4, 1951. Mandate Issued.

Apr. 4, 1951. Original Papers Sent to Clerk.

[fol. 317]

Journal Entries

32414. Saturday, December 16, 1950.

Motion for an order directing the Court of Appeals of Summit County to certify its record.

It is ordered by the Court that this motion be, and the same hereby is, allowed. J. 39—601.

32414. Friday, January 19, 1951.

Entry.

Upon application of appellant, and for good cause shown, it is ordered that the time for filing printed record herein be, and the same hereby is extended to January 29, 1951.

E. S. Matthias, Judge. J. 39—632.

32414. Wednesday, March 28, 1951.

Appeal from the Court of Appeals of Summit County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Summit County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and said cause is hereby remanded to the Court of Appeals of Summit County for further proceedings in accordance with the opinion rendered in this case.

It is further ordered and adjudged that appellant recover from appellee its costs expended in this Court taxed at \$—.

Ordered, That a special mandate be sent to the Court of Appeals of Summit County, to carry this judgment into Execution. J. 39—683.

[fol. 318] IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE OF APPEAL—Filed September 28, 1950

The Akron, Canton & Youngstown Railroad Co., hereby files in this Court, notice of its intention to appeal to this Court on condition that a motion to certify be allowed by this Court from the judgment of the Court of Appeals of Summit County, Ohio, in the above entitled action, wherein on the 11th day of September, 1950, the judgment and proceedings of the Court of Common Pleas of Summit County, Ohio, in said cause, in favor of The Akron, Canton & Youngstown Railroad Co., Defendant-Appellee therein and against John F. Dice as Plaintiff-Appellant therein, were in all things reversed by said Court of Appeals, said appeal to be on Questions of Law.

Wise, Roetzel, Maxon, Kelly & Andress, by (S.)  
Wm. A. Kelly, 1110 First National Tower, Akron,  
Ohio, Attorneys for Defendant-Appellant.

[File endorsement omitted.]

[fol. 319] IN THE SUPREME COURT OF OHIO

[Title omitted]

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO, TO CERTIFY ITS RECORD.—Filed September 29, 1950

Now comes The Akron, Canton & Youngstown Railroad Company, a corporation, Appellant herein, and respectfully represents that at the February Term of the Court of Appeals of Summit County, Ohio, to-wit, on the 11th day of September, 1950, in an action pending in said Court of Appeals in which John F. Dice was Appellant and The Akron, Canton & Youngstown Railroad Company, was Appellee, being Cause No. 4095 on the docket of said court, said Court of Appeals rendered a judgment in favor of John F. Dice, Appellant, and against The Akron, Canton

& Youngstown Railroad Company, Appellee, reversing judgment rendered in favor of said The Akron, Canton & Youngstown Railroad Company, in the Court of Common Pleas of Summit County, Ohio.

[fol. 320] The Akron, Canton & Youngstown Railroad Co., Appellant herein, further represents to the Court that there is attached hereto receipted copies of the Notices of Appeal filed in said Court of Appeals and with the Clerk of this Court on the 28th day of September, 1950, together with copies of the printed brief containing a statement of the questions presented by the record, in which there is incorporated a true copy of the journal entry of said Court of Appeals herein complained of, and a statement of the case, and copies of all opinions rendered in the case by the trial court and the Court of Appeals as required by the rules of this Court, to which reference is hereby made.

Said, The Akron, Canton & Youngstown Railroad Co., Appellant, further represents and shows to the Court that this cause is one of both public and great general interest and that error has intervened in the proceedings had in said Court of Appeals.

Wherefore, The Akron, Canton & Youngstown Railroad Co., makes application to this Court and prays for an order directing the Court of Appeals of Summit County, Ohio, to certify its record in this cause for review and correction according to law.

Wise, Roetzel, Maxon, Kelly & Andress, by (S.)  
Wm. A. Kelly, 1110 First National Tower, Akron,  
Ohio, Attorneys for Defendant-Appellant.

[File endorsement omitted.]

[fol. 321] IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed December 26, 1950

The appellant, The Akron, Canton & Youngstown Railroad Company, a corporation, for its Assignment of Error committed to its prejudice in the Court of Appeals of Sum-

mit County, Ohio, assigns the following specific error of law:

The Court of Appeals erred in reversing the judgment of the Court of Common Pleas of Summit County, Ohio, in favor of the defendant-appellant and in remanding said cause to said Court of Common Pleas with instructions to enter judgment in favor of plaintiff-appellee upon the verdict of the jury in the amount of \$25,000.00.

Wherefore, appellant prays that the judgment of said Court of Appeals may be reversed and that appellant be restored to all things which it has lost by reason thereof.

Wise, Roetzel, Maxon, Kelly & Andress, by (S.) William A. Kelly, Attorneys for Defendant-Appellant.

Filed Dec. 26, 1950. Supreme Court of Ohio, Seba H. Miller, Clerk.

(Duly acknowledged.)

[File endorsement omitted.]

[fol. 322] IN THE SUPREME COURT OF OHIO.

OPINION—March 28, 1951

No. 32414

DICE, Appellee,

vs.

THE AKRON, CANTON & YOUNGSTOWN RD. Co., Appellant

1. A complete release is not void because of fraud in the factum, where it was executed by a person of ordinary mind who could read and was not prevented from reading the release before signing it, even if, in reliance upon the false representations of the person to whom the release was given, he did not read the release and believed that such release was only a partial one.

2. Where it is claimed that a release was induced by fraud (other than fraud in the factum) or by mistake, it is necessary, before seeking to enforce a cause of action which such release purports to bar, that equitable relief from the release be secured.

3. In such an instance, the issue, as to whether the person who signed the release was induced to do so by fraud or by mistake, is an issue for determination by the court.

[fol. 323] 4. While the court, in its discretion, may submit that issue to the jury under proper instructions, the finding of the jury in respect thereto is not binding upon the court.

5. Releases by railroad employees of rights arising under the Federal Employers' Liability Act stand on the same basis as the releases of others. (*Callen v. Pennsylvania Rd. Co.*, 332 U. S. 625, followed.)

6. Where the forum is a court of the state where such a release was made, the law of that state may determine the rights of the parties with respect to an effort to avoid the release.

7. Such an effort to avoid a release relates to rights arising under the contract of release. (*Brown v. Western Ry. of Alabama*, 338 U. S. 294, distinguished.)

8. Where a release which is not void is a release of rights of an employee under the Federal Employers' Liability Act, no question relating to rights under that act arises until the contract of release has been set aside.

9. Questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in this state and questions as to the avoidance of such a release are to be determined in the courts of this state by the law of this state.

(Decided March 28, 1951.)

[fol. 324] Appeal from the Court of Appeals for Summit County.

This was an action brought under the Federal Employers' Liability Act by an employee of a railroad to recover for injuries received during employment and claimed to have been caused by the negligence of the railroad.

By its answer, defendant denied any negligence and, as a separate defense, pleaded the execution by the plaintiff for a monetary consideration of a written release of all claims, demands and causes of action against the defendant, including any arising by reason of the injuries for which plaintiff sought recovery.

Plaintiff filed an amended reply stating that "when he reported back to work" an employee of the defendant "informed him that it would be necessary to sign a paper releasing the defendant company from all claims for loss of time and medical expenses up to that date before he could go back to work and that he relied on said promises and representations"; that he denied "that he knew at the time of the execution of the purported release set forth in defendant's answer (*sic*) was a complete release in satisfaction of all claims, demands and causes of action that the plaintiff had against the defendant corporation"; that the employee of the defendant "represented . . . that said purported release was a release only for the wages lost by this plaintiff to the date thereof, by reason of his being unable to work by reason of the injuries he had sustained on or about May 29th, 1944, and that said representation was [fol. 325] false, fraudulent and was relied on by the plaintiff; that such representations were "made for the express purpose and with the intent of defrauding plaintiff, and that by reason thereof said release is null and void"; and that he had tendered back to defendant the money received under the terms of the release but that defendant had refused the tender.

When the case came on for trial, the defendant requested the trial court to determine the question as to the validity of the release before proceeding to trial of the other issues raised by the pleadings. This the court refused to do.

At the conclusion of all the evidence, the defendant requested the court to withdraw the evidence from consideration of the jury and instruct the jury to return a verdict for the defendant. The trial court refused to do this and submitted the case to the jury which returned a verdict for the plaintiff.

The undisputed evidence shows that the plaintiff was able to read. There was no evidence tending to indicate that anything was done to prevent the plaintiff from read-

ing the release before he signed it. The evidence was in conflict with respect to the allegations of fraud and mistake set forth in the plaintiff's amended reply. The written release was admittedly signed by the plaintiff who also signed a certificate appended thereto stating that he fully understood its contents and that his signing was his free [fol. 326] and voluntary act. There was also appended to the release a written receipt for the consideration provided therein stating that the amount paid was "in full satisfaction of the obligation of" defendant to plaintiff "under the provisions of the above contract." This receipt was also signed by plaintiff. The check given to plaintiff at the time of his execution of the release, certificate and receipt was payable to plaintiff and stated on its face, "in full settlement account injury received at Rushmore, Ohio, 10:08 a. m. on May 29th, 1944." This is the injury for which plaintiff seeks to recover. On the back of the check and above the endorsement of plaintiff there was the statement: "This voucher check is a payment in full of the within account, and it is agreed that the payee's endorsement hereon shall constitute an acknowledgment of such payment." Plaintiff had the check in his possession for about 24 hours before he cashed it. Admittedly, plaintiff received the consideration provided for in the release.

After the jury had returned its verdict for the plaintiff and before the court had rendered judgment thereon, the defendant filed a motion for judgment notwithstanding the verdict.

Thereafter, the trial judge made a finding wherein it was indicated that the questions of fraud and mistake had been submitted to the jury, pursuant to the theory laid down in [fol. 327] *Flynn v. Sharon Steel Corp.*, 142 Ohio St. 145, 50 N. E. (2d) 319; and that, in accordance with that case (paragraph five of the syllabus), he did not regard himself bound by the finding of the jury on those issues. This finding reads in part:

"Although the court thoroughly charged the jury upon the questions of fraud with reference to the release . . . the jury seemed to have misapprehended the whole concept of fraud, and the case is now before the court on a motion for judgment notwithstanding the verdict.

“ \* \* \* the facts do not sustain either in law or equity the allegations of fraud by clear, unequivocal and convincing evidence.

“ \* \* \* therefore \* \* \* the motion for judgment notwithstanding the verdict should be sustained.”

The motion was thereupon granted and judgment was rendered for the defendant.

Plaintiff thereupon appealed from the judgment to the Court of Appeals on questions of law only. Cf. *Meyer v. Meyer*, 153 Ohio St. 408, 91 N. E. (2d) 892, where appeal was on questions of law and fact.

The judgment of the trial court was reversed by the Court of Appeals and the cause was remanded to the trial court with instructions to render judgment for the plaintiff on the verdict of the jury.

The case is before this court on appeal, a motion to certify having been allowed.

[fol. 328] Messrs. Gottwald, Hershey & Hatch, for appellee.

Messrs. Wise, Roetzel, Maxon, Kelly & Andress, for appellant.

TAFT, J.:

The question to be decided is: May a trial court ordinarily determine the issue as to whether an employee of a railroad was induced by fraud (other than fraud in the factum) or by mistake to execute a release of his claim arising under the Federal Employers' Liability Act?

In considering the validity of releases and other contracts, this court has often called attention to the difference between fraud in the factum and fraud in the inducement. *Meyer v. Meyer*, *supra*; *Picklesimer v. Baltimore & Ohio Rd. Co.*, 151 Ohio St. 1, 84 N. E. (2d) 214; *Flynn v. Sharon Steel Corp.*, *supra*; *Perry v. M. O'Neill & Co.*, 78 Ohio St. 200, 85 N. E. 41; *DeCamp v. Hamma, Exr.*, 29 Ohio St. 467, 470. See *Manhattan Life Ins. Co. v. Burke*, 69 Ohio St. 294, 70 N. E. 74, 100 Am. St. Rep. 666.

It has been held that, where there has been fraud in the factum, the release or other contract is void and may be

disregarded as a nullity. *Flynn v. Sharon Steel Corp.*, *supra*; *Perry v. M. O'Neill & Co.*, *supra*; and *DeCamp v. Hama, Exr.*, *supra*.

Plaintiff does not seriously contend that there was any evidence in the instant case to justify a finding of fraud in the factum. He apparently recognizes that there could be [fol. 329] no such fraud in the instant case. Even if, as alleged in the amended reply, defendant did misrepresent to plaintiff the contents of the release and plaintiff executed the release in reliance upon that misrepresentation and in the belief that it was something else, plaintiff could admittedly read the release and there was no evidence that anything was done to prevent him from reading it. Plaintiff testified that he was told by defendant's employee that he would not have to read the release. [This was denied by defendant's employee. However, there was no evidence tending to prove that plaintiff was denied an opportunity to read the release.]

A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking when he signed. *DeCamp v. Hama, Exr.*, *supra*, 471, 472. • If this were permitted, contracts would not be worth the paper on which they are written. If a person can read and is not prevented from reading what he signs, he alone is responsible for his omission to read what he signs: *McAdams v. McAdams* 80 Ohio St. 232, 240, 241, 88 N. E. 542; *Upton, Assignee, v. Tribilcock*, 91 U. S. 45, 50, 23 L. Ed. 203. See *Actna Ins. Co. v. Reed*, 33 Ohio St. 283, 292. If a person knows or has an opportunity to know the contents of a written contract or release which he signs, [fol. 330] the facts, that such person does not comprehend its terms and that such failure to comprehend is due to fraudulent representations may justify rescission of the contract or release on the ground of fraud in the inducement but will not justify a finding of fraud in the factum and treatment of such contract or release as void at law. See *Cassilly v. Cassilly*, 57 Ohio St. 582, 49 N. E. 795.

Where it is claimed that a release was induced by fraud (other than fraud in the factum) or by mistake, it is first necessary, before seeking to enforce a cause of action which such release purports to bar, that equitable relief from the

release be secured. 45 American Jurisprudence, 711, Section 52. In such an instance, the issue, as to whether the person signing the release was induced to do so by fraud or by mistake, is an issue for determination by the court. *Meyer v. Meyer*, *supra*. See *Perry v. M. O'Neill & Co.*, *supra*. While the court, in its discretion, may submit that issue to the jury under proper instructions, the finding of the jury in respect thereto is not binding upon the court. *Flynn v. Sharon Steel Corp.*, *supra*. This was apparently the procedure followed in *Thompson v. Camp* (C. C. A. 6, 1947), 163 F. (2d) 396, one of the cases relied upon by the plaintiff. See, also, *Radio Corp. of America v. Raytheon Mfg. Co.*, 296 U. S. 459, 80 L. Ed. 327, 56 S. Ct. 297.

In the instant case, the trial court did submit to the jury the issue as to whether the plaintiff was induced by fraudulent [fol. 331] representations of the defendant or by mistake to execute the release. After the verdict of the jury, the court recognized its responsibility to determine that issue. The court was not bound by the jury's finding on that issue for the plaintiff. There was substantial evidence to sustain the finding for the defendant made by the court on that issue.

However, plaintiff contends that the question, as to whether the release of an employee's claim under the Federal Employers' Liability Act should be set aside for fraud or mistake, must always be determined by the law as announced by the federal courts. In effect, this amounts to a contention that the law, with regard to releases of causes of action arising under the Federal Employers' Liability Act, differs from the law with regard to releases of other causes of action. In support of this contention, plaintiff relies upon certain decisions of the federal courts.

We believe that a careful examination of those decisions will clearly disclose that they were based upon a misinterpretation, made by two judges of the Second Circuit Court of Appeals in *Ricketts v. Pennsylvania Rd. Co.*, 153 F. (2d) 757, 164 A. L. R. 387, of the decision by the Supreme Court of the United States in *Garrett v. Moore-McCormick*, 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246. This misinterpretation was subsequently rejected by the Supreme Court of the [fol. 332] United States in *Callen v. Pennsylvania Rd. Co.*, 332 U. S. 625, 92 L. Ed. 242, 68 S. Ct. 296.

Thus, in the opinion by Mr. Justice Jackson in that case it is said:

"Considerable reliance is placed upon a concurring opinion in the Court of Appeals for the Second Circuit in *Ricketts v. Pennsylvania Rd. Co.*, 153 F. (2d) 757, 760. However persuasive the arguments there stated may be that inequality of bargaining power might well justify a change in the law, they are also a frank recognition that the Congress has made no such change. An amendment of this character is for the Congress to consider rather than for the courts to introduce. If the Congress were to adopt a policy depriving settlements of litigation of their *prima facie* validity, it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.

"The plaintiff has also contended that this release violates Section 5 of the Federal Employers' Liability Act which provides that any contract to enable any common [fol. 333] carrier to 'exempt itself from any liability created by this chapter, shall to that extent be void.' 35 Stat. 66, 45 U. S. Code, Section 55. It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability, and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." (Emphasis added.)

That the *Callen* case represents a definite rejection by the Supreme Court of the United States of the *Ricketts* decision is emphasized by the dissenting opinion, stating that the dissenting judges, "being of the view that releases under the Federal Employers' Liability Act should be governed by the same rule which applies to releases by seamen in admiralty (See the separate opinion of Judge Jerome Frank, *Ricketts v. Pennsylvania Rd. Co.* \* \* \*), dissent from an affirmance of the judgment."

The basis for the decision in the *Ricketts* case appears in a statement by Circuit Judge L. Hand in his opinion and in a statement by Circuit Judge Frank in his concurring opinion. Thus, it was said by Judge Hand (page 759):

"The right of action here in suit was created by act of Congress, and it is abundantly settled that its interpretation is a matter of federal law and not governed by state [fol. 334] decisions, even when it speaks in the words of the common law. *Chesapeake & Ohio Ry. Co. v. Kuhn*, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157. It would not inevitably follow that, after such a right had come into existence, the legal effect upon it of a transaction within a state—as here, of a release—was also to be treated as matter of federal law; conceivably, its fate might be left to the law of the state. However, as we read *Garrett v. Moore-McCormick*, *supra*, this is not so. The right of action was there under the Jones Act, but the action had been brought in a state court, which had held that the burden of proof of establishing a release was governed by the law of Pennsylvania. This the Supreme Court denied, holding that the admiralty rule controlled; and it would seem to follow that the validity of the release at bar is to be decided by the common law, to be gathered from the same sources, which before *Erie Rd. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, we used to employ in cases depending on diversity of citizenship." (Emphasis added.)

It was said by Judge Frank (page 760):

"The Supreme Court recently, in a case \* \* \* relating to a release by a seaman, *Garrett v. Moore-McCormick*, *supra*, at page 248, note 17, has broadly hinted that the courts should treat nonmaritime employees, with respect to releases of personal injury claims, just as they treat seamen. I think we should take that hint \* \* \*"

[fol. 335] In *Garrett v. Moore-McCormick*, *supra*, it was pointed out that, under admiralty law, the releases of seamen stand on a different basis from that of releases of others; and that, in enforcing a cause of action of such a seaman under a federal act which a state court is given jurisdiction by that act to entertain, the state court necessarily has to recognize "the substantial rights of the parties under controlling federal law."

As clearly pointed out in the *Callen* case, "the releases of railroad employees stand on the same basis as the releases of others." It would appear, therefore, that, so far as their releases are concerned, there are no substantial rights of railroad employees under controlling federal law. A release is merely a contract between the releasor and the releasee. As pointed out in the opinion of Mr. Justice Jackson in the *Callen* case, Congress has not undertaken to legislate with regard to the rights of railroad employees to make such a contract. Furthermore, as indicated by his opinion, there is no federal common law respecting the right of such an employee to make or avoid such a contract. Where the forum is the state where such a contract was made, there would appear to be no reason why the law of that state should not determine the rights of the parties with respect to an effort to avoid the contract.

Plaintiff apparently believes that the question, as to [fol. 336] whether the issue of fraud in the making of a release shall be determined by a court or by a jury, involves a procedural problem. In support of his contention that such question should be answered by the federal law, he relies on the case of *Brown v. Western Ry. of Alabama*, 338 U. S., 294, 94 L. Ed., 100, 70 S. Ct., 105, holding that rights granted by the Federal Employers' Liability Act could not be interfered with by certain rules of practice and procedure of a state court.

However, the question here is one of whether rights arising under an Ohio contract of release should or should not be recognized. It is not a question, as in the *Brown* case, relating to enforcement of rights under the Federal Employers' Liability Act. The latter question will not arise until the contract of release has been set aside. While, to use the words of Mr. Justice Black in the *Brown* case, a right provided for by the federal act "cannot be defeated by the forms of local practice," the *Callen* case recognizes that such right may be barred by a release; and that the federal law has not, as in the case of seamen, put such a release of a railroad employee on a basis different from that of other releases. To use the words of Judge L. Hand in the *Ricketts* case, "it would not inevitably follow that, after such a right (under the Federal Employers' Liability Act) had come into existence, the legal effect upon it of a

transaction within a state—as here, of a release—was also [fol. 337] to be treated as matter of federal law; conceivably, its fate might be left to the law of the state.” We believe that the Supreme Court in the *Callen* case clearly indicated that its fate has been left to the law of the state.

It has been suggested that the *Callen* case indicates that a jury must always be permitted to pass on all issues of fact in an action to enforce rights under the Federal Employers’ Liability Act, apparently including those issues relating to the validity of a release of claims under that act. In that case, the trial judge, by what he said in his charge to the jury, took away from the jury any question as to the validity of the release, and his statements indicated that he did this on the ground that the burden was upon the railroad to prove the absence of mutual mistake or fraud with respect to the release. The employee in that case did not contend that the trial judge had the power to decide the question. Neither did the railroad. Probably the railroad ignored the question because the trial judge clearly indicated by what he said to the jury that any decision which he might have made would have been based upon his view that the burden of proof, with respect to the absence of fraud and mistake, was on the railroad.

Furthermore, a trial judge, who approached the decision of such a question with that view as to the burden of proof, could not make a decision, for which the employee could have argued, if, as it did, the Supreme Court placed upon the employee the burden of proof with respect to showing mistake or fraud.

[fol. 338] In any event, the Supreme Court in the *Callen* case would certainly have said something to indicate any intention it had to announce that the rule of *Erie Rd. Co. v. Tomkins, supra*, did not apply to the trial of issues involving the validity of releases of claims arising under the Federal Employers’ Liability Act. It said nothing to indicate such an intention but instead it stated that “releases of railroad employees stand on the same basis as the releases of others.”

With respect to the burden of proof on this question in the federal courts, it may be observed that in the *Callen* case, the Circuit Court of Appeals, in reversing the District Court, stated that “evidence in order to void the release had to be clear, unequivocal and convincing.” (162 F. (2),

832-833.) This is the precise rule with respect to burden of proof adopted by the trial judge in his finding in the instant case. The decision of the Circuit Court of Appeals in the *Callen* case was affirmed by the Supreme Court of the United States.

Several of the other cases cited by plaintiff in support of his position, that the law with regard to releases of causes of action arising under the Federal Employer's Liability Act differs from the law with regard to releases of other causes of action, make no reference to the *Callen* case. *Brown v. Pennsylvania Rd. Co.* (C. C. A. 2, 1947), 158 F. (2d) 795; *Thompson v. Camp*, *supra*; *Irish v. Central Vermont Ry., Inc.* (C. C. A. 2, 1947), 164 F. (2d), 837. This is probably due to the fact that those cases were decided before or at about the time of the report of the *Callen* case. In all those cases, the conclusions, which tend to support this position of the plaintiff, were based upon the misinterpretation, made in the *Ricketts* case, *supra*, of the decision in *Garrett v. Moore-McCormick*, *supra*, which misinterpretation was rejected in the *Callen* case.

Those cases which support this position of the plaintiff and refer to the *Callen* case apparently fail to recognize the effect of the *Callen* case on their conclusion that the validity and avoidance of a release of rights arising under the Federal Employers' Liability Act are questions of Federal law. See *Graham v. Atcheson, T. & S. Ry. Co.* (C. C. A. 9, 1949), 176 F. (2d), 819; *Chicago & N. W. Ry. Co. v. Curl* (C. C. A. 8, 1950), 178 F. (2d), 497; *Kirchgestner v. Denver & R. G. W. R. Co.* (Utah, 1950), 218 P. (2d), 685; *Collett v. Louisville & N. R. Co.* (D. C. Illinois, 1948), 81 F. Supp., 428; *Pacific Electric Ry. Co. v. Dewey* (1949), 95 Cal. App. (2d), 69, 212 P. (2d), 255; *Union Pacific Rd. Co. v. Zimmer* (1948), 87 Cal. App. (2d), 524, 197 P. (2d), 363. We do not believe that those decisions represent a correct interpretation of the law, as announced by the Supreme Court of the United States in the *Callen* case.

[fol. 340] Unless the Supreme Court of the United States announces a change in the law as announced in the *Callen* case, we are of the opinion, for the reasons hereinbefore stated, that, where the forum is a court of the state where a release of rights arising under the Federal Employers' Liability Act was made, the law of that state may determine

the rights of the parties with respect to an effort to avoid the release. Our conclusion, therefore, is that questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in this state and questions as to the avoidance of such a release are to be determined in the courts of this state by the law of this state.

The judgment of the Court of Appeals is reversed and the cause is remanded to that court for further proceedings in accordance with this opinion.

*Judgment reversed.*

Weygandt, C. J., Stewart, Middleton, Matthias and Hart, JJ., concur.

[fol. 341] ZIMMERMAN, J., dissenting:

If I were satisfied that this case as to the release involved was governed by Ohio law, I would agree with the majority opinion. However, we are dealing here with an action brought under the Federal Employers' Liability Act and the Supreme Court of the United States has said that the rights and obligations of the parties in such an action depend upon that act and applicable principles of common law as interpreted by the federal courts. See *Bevan v. New York, Chicago & St. Louis Rd. Co.*, 132 Ohio St. 245, 6 N. E. (2d) 982, certiorari denied, 301 U. S. 695, 81 L. Ed. 1351, 57 S. Ct. 924.

In the instant controversy the defendant railroad company sought to defeat plaintiff's action by reliance upon a purportedly complete release which plaintiff had executed and delivered to it. Plaintiff countered by claiming his signature to such release was induced and obtained by false and fraudulent representations and that the release was without binding effect.

Was the issue as to the validity of the release for the determination of the trial court upon the application of equitable principles as held by the majority of this court, or was the question one to be left to the jury as the trier of the facts?

[fol. 342] Federal courts, which have dealt with the problem, have taken the position that, in an action under the

Federal Employers' Liability Act, the validity of a release given by an employee to his employer is a substantive matter controlled by federal law, and that, where the employee makes the claim supported by evidence that the release was procured by fraud and misrepresentation, that issue must be submitted to the jury along with the other issues in the case. See *Brown v. Pennsylvania Rd. Co.* (C. C. A. 2), 158 F. (2d) 795; *Irish v. Central Vermont Ry., Inc.* (C. C. A. 2), 164 F. (2d) 837; *Graham v. Atchison, T. & S. F. Ry. Co.* (C. C. A. 9), 176 F. (2d) 819; *Chicago & N. W. Ry. Co. v. Curt* (C. C. A. 8), 178 F. (2d) 497, and cases cited.

Unless and until the Supreme Court of the United States holds differently, my position is the same as that adopted by the Court of Appeals herein, and I would, therefore, vote to affirm the judgment of such court.

Reporter's certificate (omitted in printing).

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[fols. 343-344] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 345] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 16, Misc.

[Title omitted]

ORDER ALLOWING CERTIORARI—October 8, 1951

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 374 and placed on the summary docket.

October 8, 1951.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 374

JOHN F. DICE,

*Petitioner,*

*vs.*

THE AKRON, CANTON & YOUNGSTOWN RAILROAD  
COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF OHIO

PETITIONER'S BRIEF

RICE A. HERSHEY,  
FREDERIC O. HATCH,  
*Counsel for Petitioner.*

GOTTWALD, HERSHEY & HATCH,  
*Of Counsel.*



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 374

JOHN F. DICE,

*Petitioner,*

*vs.*

THE AKRON, CANTON & YOUNGSTOWN RAILROAD  
COMPANY,

*Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF OHIO

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Supreme Court of Ohio is reported in 155 O.S. 185, 98 N.E. 2d 301. The opinions of the Court of Appeals of Summit County, Ohio, an intermediate appellate court, and the Common Pleas Court of Summit County, Ohio, the trial court, are unreported and appear in the appendix, *infra*, Court of Appeals opinion, p. 23, and Common Pleas opinion, p. 29.

## Jurisdiction

The final order and judgment of the Supreme Court of Ohio was entered on March 28th, 1951, 155 O.S. 185 at 186. The petition for a writ of certiorari was filed June 4th, 1951 and was granted October 8th, 1951. The jurisdiction of this courts rests upon Section 929 (3) of the Judiciary Act of June 25, 1948 (28 U.S.C.A. 1257(3)).

The final judgment of the Supreme Court of Ohio involves questions of substance arising under the Federal Employers' Liability Act. This judgment is not in accord with the decisions of this court in *Garrett v. Moore-McCormick*, 317 U. S. 239, 63 Supreme Court 246; *Callen v. Pennsylvania R. R. Co.*, 332 U. S. 625; and *Chicago, Milwaukee & St. Paul R.R. Co. v. Coogan*, 271 U. S. 472 (1926).

It is also in conflict with decisions rendered by the United States Courts of Appeals for the Second, Sixth, Eighth and Ninth Circuits upon similar questions in the following cases—

*Ricketts v. Pennsylvania Rd. Co.*, 153 Fed. (2d) 757 (Second Circuit, 1946);

*Thompson v. Camp*, 163 Fed. (2d) 396 (Sixth Circuit 1947);

*Brown v. Pennsylvania Rd. Co.*, 158 Fed. (2d) 795 (Second Circuit, 1947);

*Irish v. Central Vermont Ry.*, 164 Fed. (2d) 837 (Second Circuit, 1947);

*Graham v. Atchison, T. & S. F. Ry. Co.*, 176 Fed. (2d) 819 (Ninth Circuit, 1949);

*Chicago & N.W. Ry. Co. v. Curl*, 178 Fed. (2d) 497 (Eighth Circuit, 1950).

It is in further conflict with recent decisions rendered by appellate courts in the following States: the Supreme Court of Utah in *Kirchgestner v. Denver & R.G. W. R. Co.* (Utah 1950), 218 P. (2d) 685; and the Courts of Appeals of Cali-

fornia in *Pacific Ry. Co. v. DeWeey* (1949), 95 Cal. App. (2d) 69, 212 P. (2d) 255 and *Union Pacific Rd. Co. v. Zimmer* (1948), 87 Cal. App. (2d) 524, 197 P. (2d) 863.

This conflict creates a lack of uniformity in the administration of rights, duties and obligations arising under the Federal Employers' Liability Act.

### Questions Presented

Nine specifications of error are set forth in petitioner's petition for a writ of certiorari. Each of these specifications derives from each of the nine separate paragraphs of the syllabus of the decision of the Supreme Court of Ohio.

The Supreme Court of Ohio erred—

1. In holding that a complete release is not void because of fraud in the factum, where it was executed by a person of ordinary mind who could read and was not prevented from reading the release before signing it, even if, in reliance upon the false representations of the person to whom the release was given, he did not read the release and believed that such release was only a partial one.

2. In holding that where it is claimed that a release was induced by fraud (other than fraud in the factum) or by mistake, it is necessary, before seeking to enforce a cause of action which such release purports to bar, that equitable relief from the release be secured.

3. In holding that in such an instance, the issue, as to whether the person who signed the release was induced to do so by fraud or by mistake, is an issue for determination by the court.

4. In holding that while the court, in its discretion, may submit that issue to the jury under proper instructions, the finding of the jury in respect thereto is not binding upon the court.

5. In holding that releases by railroad employees of

rights arising under the Federal Employers' Liability Act stand on the same basis as the releases of others.

6. In holding that where the forum is a court of the State where such a release was made, the law of that State may determine the rights of the parties with respect to an effort to avoid the release.

7. In holding that such an effort to avoid a release relates to rights arising under the contract of release.

8. In holding that where a release which is not void is a release of rights of an employee under the Federal Employers' Liability Act, no question relating to rights under that act arises until the contract of release has been set aside.

9. In holding that questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in the State of Ohio and questions as to the avoidance of such a release are to be determined in the courts of the State of Ohio by the law of Ohio.

The above assignments of error present two primary or fundamental questions—

1. Whether the law of the Forum (Ohio), where the release by a railroad employee of rights arising under the Federal Employers' Liability Act was made, or the common law, as found and interpreted by the Federal Courts, determines the rights of the parties with respect to an effort by the employee to avoid the release because of fraud in factum and fraud in the inducement practiced by the railroad releasee.

2. Whether the issue of the validity of such a release, where there are disputed facts with reference to the releasor being induced by fraud in factum and fraud in the inducement, is an issue for the determination by the jury or the court.

The trial court concluded (Appendix, *infra*, p. 32)—

“ \* \* \* that under *Flynn vs. Sharon Steel Corp.* case (142 O.S. 145) this court (the trial court) can pass upon questions of fraud in this case.”

The Summit County Court of Appeals held that under the recent Federal decisions, that the validity of a release was an issue of fact for the jury to determine. After reviewing the evidence, the Court of Appeals further held (*App. infra*, p. 28)—

“The testimony presented on the issue of validity of the release was not a matter on which reasonable minds could come to but one conclusion.”

The Supreme Court of Ohio held that this question was not governed by the Federal law and that the questions of fraud, particularly, in the inducement, were factual questions for the determination of the court, the jury's function, at most, being merely advisory.

### Statutes Involved

Section 1257 (3) of the Judiciary and Judicial Procedure Act, Title 28 U.S.C.A.; Sections 51 and 55 of the Federal Employers' Liability Acts (Railroads), Title 45 U.S.C.A.; and Section 688, Jones Act (Merchant Marine), Title 46, U.S.C.A.

### Statement

The petitioner commenced an action in the Common Pleas Court of Summit County, Ohio, for money damages, by reason of certain personal injuries sustained by him during the course of his employment with the respondent railroad while both parties were engaged in interstate commerce (R. 1).

The respondent set forth two defenses in its answer (R. 4)—one, denying that it was guilty of negligence; the other,

alleging that it paid to the petitioner Nine Hundred Twenty-four and 63/100 Dollars (\$924.63), in full settlement of all claims that the petitioner had or might have against the respondent railroad by reason of the derailment.

A reply (R. 8), and later an amended reply (R. 10), was filed by the petitioner. He admits the receipt of the Nine Hundred Twenty-four and 63/100 Dollars (\$924.63), but denies that it constituted a full and complete release of all of his claims. He affirmatively alleges that one A. W. Hochberg, Chief Clerk for respondent railroad, represented to him that it would be necessary to sign a paper, releasing the railroad from all claims for loss of time and medical expense, up to the date of signature, before the petitioner could return to work. Further, he alleges that A. W. Hochberg represented to him that the paper was a release only for wages lost by the petitioner to that date by reason of his being unable to work. Petitioner alleged that he relied upon such representations, which were false, and that he was damaged by reason of the false representations. He further alleges that he had no knowledge that the purported release was a full and complete release of all of his claims against the railroad; that at no time did he receive any consideration from the railroad for the execution of said release; that said release was wholly void and without consideration; and that he tendered to the respondent railroad the said sum of Nine Hundred Twenty-four and 63/100 Dollars (\$924.63), which it refused to accept.

Upon the first trial of the cause, the jury disagreed and was discharged by the Court. At the commencement of the second trial, the respondent railroad requested the Court to determine the question as to the validity of the release before proceeding to the trial of the other issues raised by the pleadings. This, the Court refused to do. At the conclusion of all the evidence, the respondent requested the court to withdraw the evidence from the consideration of

the jury and instruct the jury to return a verdict for the defendant. This, the trial court refused to do and submitted the case to the jury, which returned a verdict of Twenty-five Thousand Dollars (\$25,000.00) for the petitioner.

Thereafter, two motions were interposed by the respondent railroad. One was for a judgment in its favor upon the special findings of fact returned by the jury, notwithstanding the general verdict of the jury in favor of the petitioner. The trial court overruled this motion. The second motion was for judgment in favor of the railroad and against the petitioner, notwithstanding the general verdict of the jury in favor of the petitioner. The trial court sustained this motion. (R. 310)

The basis of the trial court's judgment was that it was the ultimate fact finder of fraud, the jury's function merely being advisory in this respect. The trial court found that the petitioner had failed to establish by clear, unequivocal and convincing evidence the issue of fraud raised in his amended reply concerning the release set forth by the respondent railroad, in spite of the jury's general finding to the contrary. The trial court instructed the jury that the petitioner, the plaintiff, must establish fraud "by evidence, clear and convincing". (R. 296, 299) A copy of the trial court's finding may be found in the Appendix *infra*, p. 29.

The petitioner took his exception to the trial court's ruling and perfected an appeal upon questions of law only to the Court of Appeals of Summit County, Ohio, an intermediate appellate court. The question presented to the Court of Appeals was "the propriety of the trial court's finding, as a matter of law, that the several releases given by Dice, and especially the release which was executed in September, 1944, was valid and binding upon Dice". (Appendix, *infra*, p. 25. The Court of Appeals concluded that the trial court committed error. It specifically found that

"The testimony presented on the issue of validity of the release was not a matter on which reasonable minds could come to but one conclusion. The trial court was, therefore, required to present such question to the jury as an issue of fact, and not resolve such issue as a matter of law". A copy of the opinion of the Court of Appeals is set forth in the Appendix, *infra*, p. 23. The Court of Appeals reversed the trial court.

The Supreme Court of Ohio allowed the motion to certify, filed by the respondent railroad, and upon hearing the cause on the merits, reversed the Court of Appeals. Judgment of reversal was entered March 28, 1951.

### **Petitioner's Evidence of Fraud**

The derailment in which the petitioner was injured occurred on May 29, 1944. He was released by his physician on June 14, 1944, when he presented himself at the office of Chief Clerk Hochberg for the respondent railroad. This agent computed the wages lost by reason of the petitioner's absence and prepared a check in that amount, payable to his order (R. 248); and another one for Eighty-four and 19/100 Dollars (\$84.19), covering personal belongings lost in the wreck by the petitioner. Before delivering these checks, according to Dice, Hochberg handed petitioner a paper (Defs. Ex. 8, a general release, Ad. R. 272; Appendix *infra*, p. 36, stating it would be necessary for him to sign before he would be permitted to go back to work; that the paper was a release covering his loss of wages up to that date. (R. 282, 130) He further stated, according to Dice, that in the event Dice had any "recurrence" of the injuries he received due to the wreck, the railroad would reopen his case if the petitioner brought in a statement from his doctor. Hochberg admitted that he did not read the June 14th release to Dice and that he had it in his hands

only a few minutes. (R. 251) He further admits that Dice inquired, before signing, if the company would reopen his case if he suffered a "recurrence". (R. 252) He signed the paper and was immediately handed checks in the sum of One Hundred Thirty-nine and 66/100 Dollars (\$139.66) and Eighty-four and 19/100 Dollars (\$84.19), and cashed them. (Defs. Exs. 6, 7, 8, Ad. R. 272; and see R. 281, 282) Although the check for One Hundred Thirty-nine and 66/100 Dollars (\$139.66) carried a notation, "In full settlement of injuries received at Rushmore, 10:08 A. M., May 29, 1944", petitioner testified that he did not read this notation. (R. 220) The paper (Defs. Ex. 8, Ad. R. 272) which the petitioner Dice signed was, in fact, a general release of all claims against the railroad.

Thereafter, Dice suffered a "recurrence" of his injuries and was unable to work from July 6, 1944 to September 7, 1944. On three separate occasions, August 8th, August 14th and August 28th, the railroad paid Dice Seventy-five Dollars (\$75.00) each. (R. 220, 221, 223; Defs. Exs. 9, 12a, 14, Ad. R. 272, 273, 274) These checks carried the following notation: "For additional partial settlement of injuries received at Rushmore, Ohio, at 10:08 A. M., May 29, 1944". Petitioner testified that he did not read these notations. (R. 218, 221, 223, 224) On September 4th, it paid him Four Hundred Seventy-five and 78/100 Dollars (\$475.78). The check representing this sum (Defs. Ex. 12, Ad. R. 273) carried this notation: "In full settlement account of injuries received at Rushmore, Ohio, 10:08 A. M. on May 29, 1944". However, petitioner insisted that he did not read this notation. (R. 149, 151) These sums represented lost wages, which was admitted by the railroad's agent upon cross-examination. (R. 244, 245, 246, 247, 248, 250)

When the final payment was made to Dice on September 5, 1944, for all intents and purposes, the same scene was

reenacted that took place when he signed the first release on June 14<sup>th</sup>. Before giving Dice his check, the railroad's agent Hochberg handed Dice a paper, (Plfs. Ex. 6, a general release, Ad. R. 165; Appendix *infra*, p. 38, and stated, according to Dice, that this was a release only for wages lost; that he would not have to read it; and that the railroad would reopen his case in the event the petitioner suffered a "recurrence?". (R. 130, 132, 135, 136, 137, 139, 140, 142, 143, 148, 153, 155)

The paper which Dice signed was a general release of all claims which he had or might have against the railroad by reason of the injuries sustained by reason of the derailment. It was identical in form to the one he had signed earlier and is the one upon which the railroad relied as a defense to his claims set forth in the petition. (Plfs. Ex. 6, Ad. R. 165)

Dice had a "recurrence" of his injuries so that between the time of the wreck in May of 1944 and April 25<sup>th</sup>, 1947, the petitioner was off work a total of one hundred thirty-five (135) days. Since April 25<sup>th</sup>, 1947, Dice has not worked for the respondent as he was unable to perform his duties as a fireman because of his physical condition. (R. 51, 52, 56, 57, 58, 66, 85)

In April of 1947, Dice made a demand upon the respondent railroad to reopen his case, which it refused to do. Thereafter, he commenced his action in the Common Pleas Court of Summit County against the railroad.

Prior to filing his reply and amended reply, he tendered to the railroad the sums which it paid him, which it refused. This tender is admitted by the railroad. (R. 275, 276, 277)

### **Respondent's Direct Testimony**

The respondent, through A. W. Hochberg, its chief clerk, in testifying with reference to the release of June 14, 1944

(Def's. Ex. 8, Ad. R. 272; Appendix, *infra*, p. 36), and that of September 5th, 1944, (Plfs. Ex. 6, Ad. R. 165; Appendix *infra*, p. 38, denies making any representation that the amounts set forth in the releases and the checks delivered to the petitioner were for wages only, or that the railroad would reopen petitioner's file or case in the event he suffered a "recurrence" or reaction from the injuries sustained. He did, however, state that he did not tell petitioner what the September 5th release was for, and that the release was only in petitioner's hands a few minutes. (R. 234, 235)

### Respondent's Testimony upon Cross-Examination

The railroad, through A. W. Hochberg, upon cross-examination, again denied that any representations were made to the petitioner that the amounts set forth in the releases were for wages only, or that the company would reopen petitioner's case if he suffered a recurrence. However, the following, elicited from Hochberg upon cross-examination, partially corroborates petitioner's evidence of fraud:

(a) Hochberg did not read the releases to petitioner, nor did he explain their contents to him. (R. 251, 252, 257)

(b) Hochberg admitted that petitioner inquired of him as to whether or not the railroad would reopen his case if petitioner suffered a recurrence from the injuries received. (R. 252, 253, 257)

(c) Respondent admitted that they did reopen petitioner's case and made additional partial settlement after the execution of the first release. (R. 253)

(d) Respondent admitted that the amounts set forth in both releases, and the checks given to petitioner, were determined by computing what petitioner would have earned, had he worked during his time off because of his injuries. (R. 244, 245, 246, 247, 248) In

other words, the amount set forth in the releases and what petitioner received represented lost wages only.

It is obvious that the issue as to whether or not the releases were obtained by fraud or misrepresentation was one involving the weighing of the evidence and of determining the credibility of witnesses. If the jury believed the petitioner, the releases were void; if they believed Hochberg, the releases were valid.

## ARGUMENT

### I

**The Validity of a Railroad's Employee's Release Given to His Railroad Employer on Account of Injuries Sustained by Reason of a Derailment When Both Parties Were Engaged in Interstate Commerce, Is Controlled by the Law as Found and Interpreted by the Federal Courts, and Not the Law of the Forum, in an Effort by Such Releasor to Avoid His Release, Because of Fraud, Either in Factum or in the Inducement, Practiced by the Releasee.**

It has been the consistent policy of this court, since the Second Employers' Liability cases, 223 U. S. 1, that in order to insure uniformity in the administration of rights and obligations arising under the Act, Federal Court decisions, both as to the interpretation of the Act and applicable common law controlled. In *Chicago, Milwaukee & St. Paul R. R. Co. v. Coogan*, 271 U. S. 472 (1926), Justice Butler, speaking for the court, at page 474 of his opinion, said:

"By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded. Second Employers' Liability cases, 223 U. S. 1, 55; Seaboard Airline R. Co. vs. Horton, 223 U. S. 492, 504. \* \* \*

The rights and obligations of the petitioner depend upon that Act and applicable principles of common law as interpreted by the Federal courts"

See also *Chesapeake & Ohio Ry. Co. v. Kuhn*, 284 U. S. 44 (1931). To be sure, those decisions were concerned principally with questions involving the determination of liability. However, the United States Courts of Appeals, particularly those of the Second, Sixth, Eighth and Ninth Circuits have held that the principle of uniformity extends to issues involving the validity of releases. See—

*Ricketts v. Pennsylvania R. R.*, 153 Fed. (2) 757 (1946)

*Thompson v. Camp* (1947), 163 Fed. (2) 396;

*Irish v. Central Vermont Ry. Inc.*, 164 Fed. (2) 837 (1947);

*Graham v. Atchison T. & S. F. R. Co.*, 176 Fed. (2) 819 (August 30, 1949);

*Chicago & N. W. Ry. Co. v. Carl*, 178 Fed. (2) 497 (1949).

Independently of the above decisions, the provisions of Section 55 of the Act would seem to require the extension of the above rule of uniformity to questions involving the validity of releases. This Section in part provides:

"Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall to that extent be void."

The entire Section is contained in the Appendix, p. 40.

In *Duncan v. Thompson, Trustee* (1942), 315 U. S. 1, this court decided that Section 55 was equally applicable to contracts made after a railroad employee had sustained injuries, as well as to ones entered into before. Of course, this Section does not prevent the making of "a bona fide

compromise" or settlement (*Duncan v. Thompson, supra; Callen v. Pennsylvania R. R. Co.*, 332 U. S. 625). Of necessity, however, any such agreement must be interpreted or examined, to determine whether or not it impinges upon the restrictions of this Section. This is precisely what the court did in *Duncan v. Thompson, supra*.

The United States Court of Appeals for the Second Circuit in *Irish v. Central Vermont Ry. Inc.*, 164 Fed. (2) 837 at 840 (1947) held that if a "release were obtained fraudulently by the appellee (railroad employer), it was within the broad scope of the phrase, 'any . . . device whatsoever' in Section 5 and consequently void. . . . *Duncan vs. Thompson, supra.*"

In *Garrett v. Moore-McCormick Co.*, 317 U. S. 239, this court held that the validity of a seaman's release is controlled by federal law. Justice Black, speaking for the court at page 245, said—

"It must be remembered that the state courts have concurrent jurisdiction with the federal courts . . . The source of the governing law applied is in the national, not the state, governments. If by its practice, the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates."

Since the Jones Act (Title 46, Sec. 688 U. S. C. A.) incorporates by reference, the provisions of the Federal Employers' Liability Act, it would seem, therefore, that the principle of uniformity relative to seamen's releases would

be equally applicable to railroad employees' releases, and particularly, in view of the explicit provisions of Section 55 thereof.

The Supreme Court of the State of Utah in *Kirchgestner v. Denver & R. G. W. R. Co.*, 218 Pac. (2nd) 685; the California Court of Appeals in *Pacific Electric Ry. Co. v. Dewey*, 95 C. A. (2nd) 69, 212 Pac. (2nd) 255; the *Union Pacific R. Co. v. Zimmer*, 87 C. A. (2nd) 524, 97 Pac. (2nd) 363, have respectively held that the validity of railroad employees' releases are determined by the common law as interpreted by the federal courts.

## II

**The Validity of Such a Release, Where There Are Disputed Facts With Reference to the Releasor Being Induced by Fraud in Factum and Fraud in the Inducement Practiced by the Releasee, Is a Jury Issue.**

The generalization made by Judge Yankwich of the United States Court of Appeals (9th Circuit), during the course of his opinion, rendered in *Graham v. Atchison T. & S. F. R. Co.*, 176 Fed. (2) 819, at 823 (August 30, 1949), is appropriate.

He said, in considering a like problem:

"In approaching the matter, we start with the fact that, because of the nature of the Federal Employers' Liability Act and its aim to aid the employee injured in the course of his employment, courts do not encourage any action which deprives the employee of the right to have determined by a jury the controversy between him and his employer on the merits."

Among the many decisions of this court, cited in support of this conclusion, is the recent one, *Callen v. Pennsylvania R. R. Co.*, 332 U. S. 625. Accordingly, the Ninth Circuit Court of Appeals held that the factual question involving

the validity of the release was for the determination of the jury. It is noteworthy that the disputed facts in the *Graham* case involved mistake of fact and fraud in the inducement.

The United States Court of Appeals for the Second District has similarly held that questions of fact involving the validity of releases, whether they arise from mutual mistake of fact or fraud, either in factum or in the inducement, are for the determination of the jury.

Note the following:

- Ricketts v. Pennsylvania R. R.*, 153 Fed. (2) 757 (1946);
- Brown v. Pennsylvania Ry. Co.*, 158 Fed. (2) 795 (1947);
- Irish v. Central Vermont Ry., Inc.*, 164 Fed. (2) 837 (1947);

See also decision of the Eighth Circuit Court of Appeals in *Chicago & N. W. Ry. Co. v. Curl*, 178 Fed. (2) 497 (1949).

The above Appellate Court decisions, in holding that the validity of a release is a jury issue, make no distinction whatsoever between fraud in factum, fraud in the inducement or mutual mistake of fact. Apparently, this Court makes no such distinction. In *Callen v. Pennsylvania R. R. Co.*, 332 U. S. 625, it was held that the factual issues involving mutual mistake of fact were for the jury's determination. Moreover, Section 55 of the Federal Employers' Liability Act would seem to wipe out any distinction between a void and voidable release since, as Judge Chase said in *Irish v. Central Vermont Ry., Inc.*, 164 Fed. (2) 837 @ 840 (1947). "The broad scope of the phrase 'any device whatsoever'" therein would render void any contract obtained fraudulently.

Because the petitioner urged this conclusion in the intermediate Ohio Appellate Court and the Ohio Supreme Court,

the latter Court charges the petitioner, as not seriously contending that there was any evidence in the instant case to justify a finding of fraud in the factum.

We most respectfully take exception to this. According to the petitioner's testimony, the petitioner accepted the releasee's invitation not to read the September 5th release and relied upon its representation that it was for lost wages only and not a general one (R. 132, 136, 137, 139, 140, 147, 155).

The Supreme Court of Ohio holds that under such circumstances, there cannot be fraud in factum as a matter of law.<sup>2</sup>

Because the petitioner had an opportunity to read, he is estopped from saying he was misled. Note concluding paragraph in portion of Court's opinion cited footnote 1, *supra*.

<sup>1</sup> *Dice v. Rd. Co.*, 155 O.S. 185 at 190, 191.

"Plaintiff does not seriously contend that there was any evidence in the instant case to justify a finding of fraud in the factum. He apparently recognizes that there could be no such fraud in the instant case. Even if, as alleged in the amended reply, defendant did misrepresent to plaintiff the contents of the release and plaintiff executed the release in reliance upon that misrepresentation and in the belief that it was something else, plaintiff could admittedly read the release and there was no evidence that anything was done to prevent him from reading it. Plaintiff testified that he was told by defendant's employee that he would not have to read the release. This was denied by defendant's employee. However, there was no evidence tending to prove that plaintiff was denied an opportunity to read the release.

"A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking when he signed."

<sup>2</sup> In Ohio, the Syllabus is the law of the case. The first paragraph of the Supreme Court's syllabus in the *Dice* case (155 O.S. 185), reads:

"1. A complete release is not void because of fraud in the factum, where it was executed by a person of ordinary mind who could read and was not prevented from reading the release before signing it, even if, in reliance upon the false representations of the person to whom the release was given, he did not read the release and believed that such release was only a partial one."

However, the Court holds that the above evidence may be considered fraud in the inducement, but the weighing or determination of its presence, even though it involves credibility of witnesses, must be left to the Chancellor or Court. This is indeed a fine distinction since under either of its aspects there has been, in fact, no actual meeting of the minds. The releasor had no actual knowledge that the instrument was a general release; rather than a limited one for lost wages. Inject into the factual situation, physical duress or mental incapacity, then according to the Supreme Court rule, it could be considered fraud in factum. In short, under the Ohio rule, a railroad employee must deal at arm's length with his employer. He must be on the lookout at all times, even though on one occasion the railroad treated the release as represented, namely, a limited one, and reopened his case. Nevertheless, he cannot rely upon such past conduct other than at his peril. This harsh policy seems in direct conflict with that indicated by Congress through the provisions of Section 55 of the Federal Employers' Liability Act.

In this aspect, no equitable relief is involved, since neither cancellation nor ~~representation~~ <sup>reformation</sup> is required. The single question is—was there, in fact, a contract. The answer to this inquiry is—was there a meeting of the minds. The withdrawing of the determination of these facts from the jury impinges upon the limitations of the Seventh Amendment of the Constitution of the United States, guaranteeing the right of trial by jury in common law actions for money.

This Court has held, in effect, that this constitutional limitation extends to the rights granted under the Federal Employers' Liability Act. See *Bailey v. Central Vermont Railway, Inc.*, 319 U. S. 350, in which Mr. Justice Douglas said at page 354:

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence'. Jacob v. New York, 313 U. S. 752 \* \* \* It is a part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act."

If the petitioner is correct in his contention that the validity of the release is a jury issue, particularly, when there is fraud in factum, then the evidence in this case is such that under federal law, as applied by federal courts, motions for a directed verdict or a judgment for the defendant notwithstanding the verdict of the jury in favor of the plaintiff, would have been overruled and not sustained.

The intermediate Appellate Court (Court of Appeals of Summit County, Ohio), after reviewing all of the evidence, expressly held (Appendix, *infra*, p. 28):

"\* \* \* The testimony presented on the issue of validity of the release was not a matter on which reasonable minds could come to but one conclusion. The trial court was therefore required to present such question to the jury as an issue of fact, and not resolve such issue as a matter of law."

The Supreme Court of Ohio does not contradict this factual conclusion but holds, since the validity of the release is for judicial rather than jury determination, there was then substantial evidence to sustain the court's finding that fraud was not shown by clear and convincing evidence. Parenthetically, the trial court charged the jury that the plaintiff had the burden to establish his claim of fraud against the defendant company by clear and convincing evidence (R. 294, 296, 299).

The rule applied by the Summit County Court of Appeals in this respect is in accord with the federal rule. In *Wilkinson v. McCarthy*, 336 U. S. 53 (1949), @ p. 62, Mr. Justice Black stated:

"And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fairminded men may draw different inferences'. *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 572. Such has ever since been the established rule for trial and appellate courts."

If there is any conflict in the evidence, it is for the jury and not the court to resolve. This is so, even though there is a very narrow conflict. See Mr. Justice Black's opinion in the above case, page 60, wherein he says:

"While this left only a very narrow conflict in the evidence, it was for the jury, not the Court to resolve the conflict."

The weighing of the credibility of witnesses has repeatedly been held to be a jury function. Note; *Brady v. Southern R. R. Co.*, 320 U. S. 476.

If the jury, in the instant case, believed Dice, there was fraud in factum as well as fraud in the inducement and the release is void. If the jury did not believe Dice, but rather Hochberg, then such fraud is not present and the release is valid.

Any contention that this issue of whether it is a jury or court function to determine the validity of a release is one of form and not of substance, is completely disposed of by the decisions in *Garrett v. Moore-McCormick Co.*, 317 U. S. 239 (1942) and *Brown v. Western Ry. Alabama*, 338 U. S. 294 (1949). To be sure, the former involved the question of burden of proof. Mr. Justice Black, during his opinion therein, said:

"\* \* \* The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very

substance of his claims and cannot be considered a mere incident of a form of procedure. \* \* \* (317 U. S. 239 @ 249).

In the latter case, it is held that the right of trial by jury is a part of the employee's substantive rights and that rules of the forum would not be permitted "to dig into substantive rights". In the *Brown* case, a general demurrer to the petition was sustained by the trial court which was ultimately affirmed by the Supreme Court of Georgia, under a statutory rule of Georgia, requiring pleadings to be strictly construed upon demurrer thereto. In answer to the contention that such provisions involved mere form and not substance, Mr. Justice Black said:

"It is contended that this construction of the complaint is binding on us. The argument is that while state courts are without power to detract from 'substantive rights' granted by Congress in the FELA cases, they are free to follow their own rules of 'practice' and 'procedure'. To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best as is shown in the very case on which respondent relies.

\* \* \* Other cases in this court point up the impossibility of laying down a precise rule to distinguish 'substantive' from 'procedure'.

"Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether the petitioner had been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice" (338 U. S. 294 @ 296).

### Conclusion

It is respectfully submitted that the trial court and the Supreme Court of Ohio misinterpreted the law. The cor-

rect rule of law was stated and applied by the intermediate Appellate Court, the Summit County Court of Appeals. The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

RICE A. HERSHEY,  
FREDERIC O. HATCH,  
GOTTWALD, HERSHEY & HATCH,  
*Attorneys for Petitioner.*

October, 1951.

## APPENDIX

## OPINION OF THE COURT OF APPEALS

No. 4095

IN THE COURT OF APPEALS, NINTH JUDICIAL  
DISTRICT

State of Ohio, Summit County, SS

JOHN F. DICE, *Appellant*

v.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD Co., *Appellee*

## OPINION

Argued June 22, 1950

Decided Aug. 2, 1950

## APPEAL ON QUESTIONS OF LAW

Gottwald, Hershey &amp; Hatch, for Appellant.

Wise, Roetzel, Maxon, Kelly &amp; Andress, for Appellee.

HUNSICKER, J.:

This is an appeal on questions of law.

John F. Dice, appellant, herein called Dice, brought an action against The Akron, Canton & Youngstown Railroad Co., appellee, herein called Railroad, to recover for personal injuries arising out of an accident which occurred when a locomotive upon which Dice was working as a fireman, was derailed.

The parties were engaged in interstate commerce, and the action was brought under the provisions of the Federal Employers' Liability Act.

The petition of Dice alleged the essential facts necessary to state a cause of action. The Railroad in its answer admitted that it was a common carrier engaged in interstate commerce, and that Dice, an employee, was injured as a result of the derailment, but specifically denied it was

guilty of negligence, and denied the claimed extent and nature of the injuries Dice sustained.

As a second defense to the claims of Dice, the Railroad said it had paid Dice the sum of \$924.63 as a full and complete settlement of all claims which he might have against the Railroad. The Railroad also alleged that Dice had executed and given to the Railroad a full and complete written release and satisfaction of all claims and rights of action which he, Dice, might have against the Railroad.

A reply, and later an amended reply, was filed by Dice, in which he stated that: there was no full and complete settlement of his claims against the Railroad; \$924.63 was paid to him but not as a full settlement; he tendered the amount of \$924.63 to the Railroad, which sum they refused to accept; he signed various papers for the Railroad which, he was informed, were necessary to release the Railroad from claims for loss of work time and medical expenses before he, Dice, could return to work. Dice further denied that he knew that, at the time he executed the purported release, it was a complete release of all claims of every kind and character. Dice further said he believed the representations of the agent for the Railroad that such release was only for wages lost to the date of the signing of such release; that such representation was false and was relied upon by him to his damage.

At the beginning of the trial, counsel for the Railroad sought to have the validity of the release determined by the court as a matter of law, separate and apart from and prior to the determination of any issues of fact. The trial court determined to proceed to try all issues to the jury.

A verdict was returned by the jury in favor of Dice, and, upon a motion for judgment notwithstanding the verdict made by the Railroad, a judgment in favor of the Railroad was entered by the court.

It is from such judgment that this appeal is prosecuted by Dice, who says:

"The trial court committed error prejudicial to the rights of the plaintiff-appellant in sustaining the defendant-appellee's motion for judgment in its favor.

notwithstanding the verdict of the jury for the plaintiff-appellant."

The parties, by their briefs and in oral argument of counsel, confine their discussion to the propriety of the trial court's finding, as a matter of law, that the several releases given by Dice, and especially the release which was executed in September, 1944, were valid and binding upon Dice.

The instant case was brought pursuant to the provisions of the Federal Employers' Liability Act of 1908, 45 U. S. C. A., Sec. 51, et seq., as amended in 1939.

We are, therefore, required to determine whether, under the provisions of the Federal Employers' Liability Act, the submission of the question of the validity of such a release is a matter for the jury or for the court.

"By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded. \* \* \*

The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the Federal courts."

Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, 271 U. S. 472, at p. 474; 70 L. Ed. 1041, at p. 1043.

See also:

Chesapeake & Ohio Ry. Co. v. Kuhn, 284 U. S. 44, at p. 46; 76 L. Ed. 157, at p. 160.

"It is contended that this construction of the complaint is binding on us. The argument is that while state courts are without power to detract from 'substantive rights' granted by Congress in FELA cases, they are free to follow their own rules of 'practice' and 'procedure'. To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best as is shown in the very case on which respondent relies. Central Ver-

mont. R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433, 35 S. Ct. 865, Ann Cas. 1916B 252, 9 NCCA 265. Other cases in this Court point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure'. Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice. See American R. Exp. Co. v. Levee, 263 U. S. 19, 21, 68 L. Ed. 140, 143, 44 S. Ct. 11."

Brown v. Western Ry. of Alabama, 338 U. S. 294, 94 L. Ed. 93, at p. 95.

Many recent cases concerning the more limited phase of the problem before us have been reported by the federal courts. If it ever was the law, as applied to this question before us, that the validity of a release merely voidable, was a question of law to be determined by the court and not an issue of fact to be submitted to the jury, these late cases effectively state that the issue is one of fact for a jury to determine.

In this connection, the recent case of Garrett v. Moore-McCormick Co. (1942), 317 U. S. 239; 87 L. Ed. 239 (a release case founded under the Federal Merchant Marine Act), made a pronouncement on the subject which the Federal Circuit Courts of Appeals were quick to adopt in their applications to similar situations arising under the Federal Employers' Liability Act.

The validity of a release which is relied on as a defense to an action under the Federal Employers' Liability Act is a question which is to be determined by federal law.

Ricketts v. Pennsylvania Rd. Co., 153 Fed. (2d) 757 (Second Circuit, 1946);

Brown v. Pennsylvania Rd., 158 Fed. (2d) 795 (Second Circuit, 1947);

Thompson v. Camp, 163 Fed. (2d) 390 (Sixth Circuit, 1947);

Irish v. Central Vermont Ry., 164 Fed. (2d) 837 (Second Circuit, 1947);

Graham v. Atchison, T. & S. F. Ry. Co., 176 Fed. (2d) 819 (Ninth Circuit, 1949);

Chicago & N. W. Ry. Co., v. Curl, 178 Fed. (2d) 497 (Eighth Circuit, 1950).

The Supreme Court of the United States, so far as we have been able to discover, has not directly passed on the limited question before us in the instant case. That court, however, in the case of Callen v. Pennsylvania Rd. Co., 332 U. S. 625, 92 L. Ed. 242, did say, in a release case, at page 629:

"It is apparent that the jury accepted the instructions of the court on the subject of the release. Returning, they rendered a verdict for the plaintiff, and assess the damages at \$25,240.00, of which the Railroad is to be reimbursed with \$250.00. The court, saying he wanted to make the record right, asked the jury if they made a net finding of \$24,990, which the foreman said they did. Under the instructions they had received, there was little else that the jury could do, for the court had withdrawn from them the issue as to the validity of the release and consequently had given them no instructions as to the law that should govern the determination of any such question.

"While the trial court assumed a finding of permanency as a basis for his setting aside of the release, after challenge to his assumption as to the nature of the injuries he made every effort to correct the impression, insofar as it affected the issue of damages. But the trial court did not correct or in any way alter his determination that the release was not binding insofar as it rested on the assumption of permanent injury. The Court of Appeals was right in holding that failure to submit this latter question to the jury was reversible error."

The recent federal cases make no distinction in the requirement that, even though the release is merely voidable and not void, a jury issue is presented.

Graham v. Atchison, T. & S. F. Ry. Co., 176 Fed. (2d) 819;

Chicago & N. W. Ry. Co. v. Curl, 178 Fed. (2d) 497;

And the Per Curiam opinion in Brown v. Pennsylvania Rd. Co., 158 Fed. (2d) 795, as bearing on this question, is as follows:

"The appellant contends that a verdict should have been directed in its favor because of a general release executed by the plaintiff in consideration of the payment to him of \$170.40. This sum was the amount of wages lost during the period of time he was incapacitated for work by reason of his injuries. He testified that he signed the document without reading it in full, believing it to be a receipt for lost wages because of representations made by the defendant's claim agent. The latter told a different story. Whether the release was procured by misrepresentation presented an issue involving the credibility of contradictory witnesses which was properly submitted to the jury for decision. See *Chesapeake & Ohio R. Co. v. Howard*, 178 U. S. 153, 167, 20 C. Ct. 880, 44 L. Ed. 1015; *Southern Ry. Co. v. Clark*, 6 Cir., 233 F. 900; *Miles v. Lavender*, 9 Cir., 10 F. 2d 450; *Ricketts v. Pennsylvania R. Co.*, 2 Cir., 153 F. 2d 757; *Farrington v. Harlem Savings Bank*, 280 N. Y. 1, 19 N. E. 2d 657. There was also testimony that the defendant's doctor had not fully informed the plaintiff of the extent of his injuries. See *Bonici v. Standard Oil Co.*, 2 Cir., 103 F. 2d 437, 439."

We therefore determine that the trial court committed error prejudicial to the rights of the appellant in entering judgment notwithstanding the verdict. The testimony presented on the issue of validity of the release was not a matter on which reasonable minds could come to but one

conclusion. The trial court was therefore required to present such question to the jury as an issue of fact, and not resolve such issue as a matter of law.

We order that the cause be remanded to the Common Pleas Court, with instructions to enter judgment upon the verdict for the appellant, Dice.

STEVENS, P. J., and DOYLE, J., concur.

## FINDING OF THE COURT OF COMMON PLEAS

No. 161,856

IN THE COURT OF COMMON PLEAS

State of Ohio, Summit County, SS

JOHN F. DICE, *Plaintiff*,

*vs.*

THE AKRON, CANTON & YOUNGSTOWN RAILROAD CO.,  
*Defendant*

FINDING—December 12, 1949

HARVEY, J.:

This cause was presented to the jury upon the Petition, Answer and Reply. The Petition set up a cause of action for negligence under the Federal Employers Liability Act. The Answer set up a defense as a bar to that action by way of a release and also denied negligence. The Amended Reply set up an allegation in which it was attempted to plead facts, which if proven would make the release void because of fraud.

The matter was submitted to the jury, first, upon the issue of fraud, and second, upon the questions of negligence, and the jury returned a verdict for the plaintiff.

The matter was submitted to the jury upon the theories laid down in the case of *Perry v. O'Neil*, 78 Ohio State 200, and *Flynn v. Steel Company*, 142 Ohio State 145. In the

latter case it is specifically held that "if an examination of a Reply reveal substantial averments of fraud and misrepresentation as to the nature of the instrument signed, which if proven would make the transaction wholly void and ineffective, then under such state of the pleadings it was within the discretion of the Trial Court to submit the issue of fraud to the jury under proper instructions. However, the Court is not bound by the findings of the jury."

Another branch of this Court submitted the issue to the jury heretofore, and after keeping the jury out for two days they were unable to agree upon either the question of negligence or fraud.

Upon the re-trial the Court submitted Special Interrogatories; but upon the question of fraud the answers to the Interrogatories were of no assistance to the Court with the possible exception that the jury did find that the plaintiff had an opportunity to read the Agreement and Release, and did have an opportunity to read the Bank Check of September the 5th, 1944 for \$475.78, and was not prevented from reading the Agreement and Release of September 5, 1944.

Although the Court thoroughly charged the jury upon the questions of fraud with reference to the Release in the second trial, the jury seemed to have misapprehended the whole concept of fraud, and the case is now before the Court on a Motion for Judgment Notwithstanding the Verdict.

The facts substantially show that the plaintiff in this case was a fireman upon a locomotive which derailed, and that he sustained some injuries; that after the accident he was taken to the end of the line; that he slept all the rest of the day and in the evening was taken in an automobile to the Britain Road Yards, where in his own car he drove home; that the following day at the instance of the railroad company he was taken to the City Hospital.

The accident occurred on May 29, 1944. He was placed in the City Hospital on May 30, 1944 and was released June 2nd, 1944. He had some multiple contusions and was discharged upon that date. An X-ray taken at that time shows—osteo-arthritic changes of the cervical spine and no evidence of fracture, no evidence of any fractured ribs.

Since the osteoarthritic conditions showed on the X-rays two days after the accident, it cannot be claimed that this condition arose from this accident. Plaintiff complains particularly of pain in the region of his lower left abdomen or groin.

Under the authority of *Flynn v. Steel Company*, supra, this Court is of the opinion that the first issue to be determined under the Motion for Judgment Notwithstanding the Verdict is the validity of this Release, it being claimed that the Release is of no force or effect and is vitiated by fraud upon the part of the agent of the Railroad Company.

After the plaintiff had been released from the Hospital and remained at home for some time, he made a claim for additional damage by way of personal belongings destroyed in the wreck, and on June 14, 1944, he was given a check which stated across the front thereof, "To reimburse you for personal belongings destroyed in wreck at Rushmore, May 29, 1944." On the same date he was given a check for \$139.66 in full settlement, marked, "In full settlement for personal injury received at Rushmore, Ohio, at 10:00 A.M., May 29, 1944"; and he also signed a complete release upon the same date. He was released for work by Dr. Leffmon on June 13th, 1944, went back to work on June 15, and worked the balance of that month and also worked on July 1st, July 3rd and 4th. He did not work during the month of August.

During the month of August the plaintiff was given three separate checks for \$75.00 each on August 8th, the 14th and the 28th, and the checks were marked across the front, "For additional partial settlement of personal injury received at Rushmore on May 29, 1944."

Plaintiff during this interim had been attended by Dr. Schaffner. On the 5th day of September, 1944 the plaintiff was ready to report for work, and he called at the office of the railroad company where he talked to the company's agent, Mr. Hochberg. The evidence discloses that he was in the office about one hour, and that during that time Mr. Hochberg checked over his record and the former expenditures that had been made and a Release was typed and handed to the plaintiff for his signature. The Release is known as Plaintiff's Exhibit 6 in this case. At the top of

the Release, it says in bold type, "Agreement and Release," and in black bold type the Release specifically says "Personal Injuries received at Rushmore, Ohio 10:00 A.M., May 24, 1944, in addition to the settlement made on June 14, 1944 and partial settlements of \$75.00 each made on August 8th, 14th and 28th, 1944." The Agreement was made on the 5th day of September.

There is a typographical error "9th day of September," but this was conceded to be a typographical error.

The plaintiff signed this Release in three places.

He signed the complete Release and under this is the following language, "I hereby certify that I fully understand the contents of the above instrument and that the affixing of my signature thereto is my free and voluntary act," signed "John F. Dice," and below this the Release says, "I have this day received from The Akron, Canton, Youngstown Railroad Company the sum of \$475.78 in full satisfaction of the obligation of The Akron, Canton & Youngstown Railroad Company to me under the provisions of the above contract," signed "John F. Dice."

At the same time the plaintiff was given a check for the above sum, and across the face of the check was the following language, "In full settlement account of injury received at Rushmore, Ohio 10:08 A. M. on May 29, 1944." The check was later endorsed and cashed by the plaintiff.

Now, the plaintiff claims that it was represented to him that it would be necessary to sign a paper releasing the defendant Company from all claims for loss of time and medical expenses up to that date before he could go back to work, and that he relied on said promises and representations. He also claims that it was represented by Hochberg that the purported Release was a release only for wages lost by this plaintiff to the date thereof by reason of him being unable to work by reason of the injuries he had sustained.

And it is these claimed representations that constitute the fraud in the obtaining of the execution of this Release.

Whether these alleged misrepresentations constitute a proven a void release or a voidable release it is not necessary to decide. The Court is of the opinion that under the Flynn v. Steel Company case this Court can pass upon the question of fraud in this case.

In a suit under the Federal Employers Liability Act, the Federal law controls as to the validity of a release pleaded and proved in bar of the action, and the burden of showing that the alleged fraud vitiates the contract or compromise or release rests upon the party attacking the release.

In determining whether a release was obtained by fraud, the result turns on the nature of the transaction involved, the representations by the representor, the relation existing between the parties, whether one of trust, confidence, friendship, close acquaintance or that of strangers dealing at arms-length or trick or artifice, if any, employed.

The evidence in this case does not disclose any trick or artifice used upon the part of Mr. Hochberg. The plaintiff signed a release and he knew he was signing a release. The parties were dealing at arms-length, and when a contract is reduced to writing it expresses final agreement and is presumed to merge all prior negotiation and becomes the highest evidence of agreement, and possesses greater stability than the contracts merely in parole.

In the case of *Poe v. Illinois*, 99 S. W. 2nd, at page 82, it was held in an action under the Federal Employers Liability Act that an employe is not entitled to avoid a release for injuries which employe denied being able to read, claimed had been obtained by fraudulent representation that it was merely a receipt for wages or injuries where across the face of the Release was printed 'Read this Release.' Employe did not apprise employer's agent that he was unable to read an application for employment, various records or statement of injuries previously signed by employe, stated that he had read them."

In this case we have a situation where the plaintiff not only could read but didn't read, and he claims that the several releases that he received and the several checks that he received were not read by him.

In the case of *Rader v. Lehigh Valley Railroad Company*, 26 Federal Reporter, 2nd, the Court held that "One employe as a locomotive engineer for thirty-five years who was handed a general release by railroad's claim agent and signed statement that he understood and had read release and signed vouchers acknowledging receipt of money

paid in settlement, held as a matter of law not entitled to recover for injuries from railroad, and refusal of Court to submit case to jury on issue of fraud was proper."

The plaintiff in this case had been in the railroad business for eight years. He had worked for three different railroads during that time.

The Court further held that "supra evidence of fraud must be clear, precise and indubitable to permit submission of question of fraud to jury to overturn written instrument."

The only testimony upon which he can base any question for the jury is his bare testimony about it that he took it to be a release for wages. It is true that he volunteered a statement that the representative had promised that this matter would be re-opened in the event that he had, as he termed, a reaction.

How can he say that the agent said it would be re-opened, and at the same time say he did not understand that it was for all injuries he had received? If the matter of reopening the question was before the parties at the time this instrument was executed, then the injury must have been discussed. In order to rescind a release upon the ground of fraud, the false statement or representation must be one which gives rise to the contracting of the parties.

The plaintiff knowing his injuries and knowing that his physician had checked him for work, and knowing that he had been heretofore paid certain sums of money, it seems quite evident that the plaintiff would undoubtedly have signed the agreement and taken the \$475.00 if Hochberg had said to him, "This covers all your injuries or damages." It may be assumed that the plaintiff would not have signed the release had he known that in the distant future that he would be disabled. Does it follow that he signed a contract because of any misstatement of Hochberg: This Court thinks not. He believed at the time that he was ready to go to work, and he knew at the time that he had signed releases before and that he had been paid for the loss of time, loss of personal property and medi-

cal expense. He knew that he had been dismissed from the hospital as early as June 6, 1944. He believed and expected he would be paid for any further loss of time and he was willing to accept that at the time.

When he speaks of a release for the loss of wages or time he had lost, that of course had reference to the time he had lost by reason of this injury that he sustained in May, 1944, and it is apparent that at the time he supposed that the only claim he had against the Company on account of these injuries were for loss of time for a few days and loss of wages in consequence of loss of time and such loss of time being due to the injury which he had sustained. It seems quite evident that he knew that he was releasing the Company from the only claim that he supposed he had against the Company for the injury that he supposed he had received.

Under such a situation it was held in the case of Railroad Company v. Coleman, 12 O. C. C. (N. S.) page 497 (502), that "under such circumstances it was held a release is valid in law although it be discovered afterwards that he had received more serious injuries than he supposed when he signed the release."

"The fact that a false representation was made, if it were made, in respect to the paper is not necessarily sufficient to excuse plaintiff for affixing his signature thereto in ignorance of the contents unless under all the circumstances in view of his duty to give reasonable attention to the protection of his own interests the false representation was reasonably calculated to and did induce him not to make the investigation which he would have otherwise made."

The plaintiff in this case had no intention and did not care whether he made any investigation or not.

And as was said in the case of Rader v. Lehigh Valley Railroad, supra, "If a party who can read will not read a deed put before him for execution or if being unable to read will not demand to have it read or explained to him,

he is guilty of supine negligence, which I take it is not the subject of protection either in equity or law."

This, in the opinion of this Court, is exactly the position of the plaintiff in this case, and the facts do not sustain either in law or equity the allegations of fraud by clear, unequivocal and convincing evidence.

It is, therefore, the opinion of this Court that the Motion for Judgment Notwithstanding the Verdict should be sustained.

The Court should further call the counsel's attention to the fact that the line of cases where releases have been held void are generally situations where the injured party is under opiates or under shock or in a hospital, and are instances where the Agent hands a release to the injured party while he is under disability and the release is folded and he does not understand what he is signing or hasn't the full opportunity to know what he is signing.

None of such facts exist in this case, but on the contrary the releasor in this case was in possession of all of his faculties and had had months to consider the whole question of his claim against the railroad.

---

DEFENDANT'S EXHIBIT 8—AGREEMENT AND RELEASE OF  
JUNE 14, 1944

THE AKRON, CANTON & YOUNGSTOWN RAILROAD  
COMPANY

AGREEMENT AND RELEASE

File: 7-2805

This Agreement made this 14th day of June, 1944 by and between The Akron, Canton & Youngstown Railroad Company and J. F. Dice of Akron, State of Ohio, hereinafter known as the Claimant:

Witnesseth:

That The Akron, Canton & Youngstown Railroad Company hereby agrees to pay said Claimant the sum of \$139.66 as the sole consideration and without any other promise or agreement, and said Claimant hereby agrees

that he will accept said sum from The Akron, Canton & Youngstown Railroad Company in full settlement and satisfaction of, and that he will and does by these premises, release and discharge said The Akron, Canton & Youngstown Railroad Company from all claims, demands and causes of action whatsoever in whatever manner arising against The Akron, Canton & Youngstown Railroad Company, its successors and assigns, at common law or under any state or federal statute, which the said Claimant now has, including such as have arisen by reason of or in any manner may grow out of personal injury received at Rushmore, Ohio, 10:08 A.M., May 29th, 1944.

In Witness Whereof, the said J. F. Dice and said The Akron, Canton & Youngstown Railroad Company have executed this agreement and release on this 14th day of June, 1944.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD  
COMPANY,

By J. G. WATKINS.

Executed in the presence of:

CLARA R. PUGH,  
A. W. HOCKBERG.

JOHN F. DICE,  
*Claimant.*

C. R. PUGH,  
A. W. HOCKBERG.

I hereby certify that I fully understand the contents of the above instrument and that the affixing of my signature thereto is my free and voluntary act.

JOHN F. DICE,  
*Claimant.*

Executed in the presence of:

C. R. PUGH,  
A. W. HOCKBERG.

\$139.66

Akron, Ohio.  
June 14th, 1944.

I have this day received from The Akron, Canton & Youngstown Railroad Company the sum of \$139.66 in full

satisfaction of the obligations of The Akron, Canton & Youngstown Railroad Company to me under the provisions of the above contract.

JOHN F. DICE,  
Claimant.

PLAINTIFF'S EXHIBIT 6—AGREEMENT AND RELEASE OF SEPTEMBER 5, 1944.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY

AGREEMENT AND RELEASE

File: 7-2805

This Agreement made this 5th day of September, 1944 by and between The Akron, Canton & Youngstown Railroad Company and John F. Dice of Akron, State of Ohio, hereinafter known as the Claimant:

Witnesseth:

That The Akron, Canton & Youngstown Railroad Company hereby agrees to pay said Claimant the sum of \$475.78 as the sole consideration and without any other promise or agreement, and said Claimant hereby agrees that he will accept said sum from The Akron, Canton & Youngstown Railroad Company in full settlement and satisfaction of, and that he will and does by these premises, release and discharge said The Akron, Canton & Youngstown Railroad Company from all claims, demands and causes of action whatsoever in whatever manner arising against The Akron, Canton & Youngstown Railroad Company, its successors and assigns, at common law or under any state or federal statute, which the said Claimant now has, including such as have arisen by reason of or in any manner may grow out of personal injury received at Rushmore, Ohio, 10:08 A.M., May 29th, 1944, in addition to settlement made on June 14th, 1944, and partial settlements of \$75.00 each, made on August 8th, 14th and 28th, 1944.

In Witness Whereof, the said John F. Dice and said The Akron, Canton & Youngstown Railroad Company have executed this agreement and release on this 9th day of September, 1944.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD  
COMPANY,

By H. G. WATKINS.

Executed in the presence of:

AUDREY GOULDTHREAD,  
A. W. HOCKBERG.

JOHN F. DICE,

AUDREY GOULDTHREAD,  
A. W. HOCKBERG.

I hereby certify that I fully understand the contents of the above instrument and that the affixing of my signature thereto is my free and voluntary act.

JOHN F. DICE,  
Claimant.

Executed in the presence of:

AUDREY GOULDTHREAD,  
A. W. HOCKBERG.

\$475.78

Akron, Ohio.  
September 9th, 1944.

I have this day received from The Akron, Canton & Youngstown Railroad Company the sum of \$475.78 in full satisfaction of the obligations of The Akron, Canton & Youngstown Railroad Company to me under the provisions of the above contract.

JOHN F. DICE,  
Claimant.

Title 45, Section 51, Federal Code Annotated:

"Section 51—*Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence.*—Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of

the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65.)

Title 45, Section 55, Federal Code Annotated:

"55. *Contract, rule, regulation, or device exempting from liability, set-off.*—Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. (Apr. 22, 1908, c. 149, Sec. 5, 35 Stat. 66.)"

Title 46, Section 688, Federal Code Annotated:

"688. *Recovery for injury to or death of seaman.*—Any seaman who shall suffer personal injury in the course of his employment may, at his election, main-

tain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.)"

(8000)

PETITION NOT PRINTED

Office Supreme Court, U. S.  
FILED

JUL 5 1951

CHARLES ELMORE GROPLEY  
CLERK

In the Supreme Court of the United States

Civil Case No. 16374

Miscellaneous.

OCTOBER TERM, 1951

JOHN F. DICE,

*Petitioner,*

THE AKRON, CANTON & YOUNGSTOWN RAILROAD  
COMPANY,

*Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI.

CLETUS G. RORTZEL,  
WILLIAM A. KELLY,  
WISE, RORTZEL, MAXON, KELLY & ANDREAS,  
1110 First National Tower,  
Akron 8, Ohio,

*Attorneys for Respondent.*



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# In the Supreme Court of the United States

## Civil Case No. 16

Miscellaneous.

OCTOBER TERM, 1951.

JOHN F. DICE,

*Petitioner,*

v.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD  
COMPANY,

*Respondent.*

### **BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

#### **OPINIONS BELOW.**

The opinion of the Supreme Court of Ohio will be reported in 155 Ohio State Reports, page 185, and now found in the Advance Reports, 98 North Eastern 2nd, 301. The opinions of the Ohio Court of Appeals and the Common Pleas Court of Summit County, Ohio, are not reported.

#### **JURISDICTION.**

The jurisdiction of this Court is invoked under Section 929 (3) of the Judicial Act of June 25, 1948; 28 U. S. C. A. 1257.

#### **QUESTIONS PRESENTED.**

1. Has the Supreme Court of Ohio decided a Federal question of substance not theretofore determined by this Court, or has it decided a question in a way probably not in accord with applicable decisions of this Court?

2. Did the Supreme Court of Ohio err in deciding that the trial Court (the Common Pleas Court) had the right to determine, under the pleadings and the evidence of the case, the issue as to whether an employee of a railroad was induced by fraud (other than fraud in the factum) or by mistake to execute a release of his claim arising under the Federal Employer's Liability Act?

### HISTORY.

Since a statement of the course taken by the proceedings in the State Courts, as well as of the facts, becomes necessary to determine whether the judgment of the Ohio Supreme Court should be reviewed by this Court, attention is directed thereto.

On May 21, 1947, Petitioner commenced an action in the Common Pleas Court of Summit County, Ohio, against Respondent, to recover damages of \$50,200.00 for personal injuries and expenses, arising out of an accident which occurred on May 29, 1944, when a locomotive, upon which he was working as a fireman, was derailed near Rushmore, Ohio, when the parties were engaged in Interstate Commerce. He described his injuries as:

"bruises and contusions all over his entire body, particularly in the region of his lower left abdomen (or groin); internal injuries and severe traumatic shock;"

Respondent by its answer admitted that at the time of said occurrence the parties were engaged in Interstate Commerce; that there was a derailment of the locomotive upon which Petitioner was engaged as a fireman, and that he sustained some injuries, with a denial of any negligence upon its part. As a second defense it specifically set forth an agreement and release dated September 5, 1944, executed by Petitioner and averred payment of the sum of \$924.63 to Petitioner as a full and complete settlement and

release of any and all claims set forth in said petition. (See Exhibits 6, R. 5, 125, 165; and 18, R. 147, 274.)

On August 4, 1947, Petitioner filed a reply in which he said:

"First: One Hochberg, Chief Clerk, informed him in September, 1944,

(a) It would be necessary to sign a paper releasing defendant from all claims for loss of time and medical expenses up to that date before he could go back to work.

(b) That in the event of Plaintiff's inability to work in the future or if he incurred further medical expenses in the future as a result of Plaintiff's injury in May, 1944, the disability file of Plaintiff would be reopened.

Second: That he relied on promises and representations, 'a' and 'b.'

Third: That after September, 1944, he requested Defendant to reopen this case pursuant to said promises and representations, and that Defendant's agents, Clerk Hochberg and Vice President Watkins, agreed to do so.

Four: That on April 29, 1947, he was instructed by Watkins to present himself to Defendant's doctor for another examination, and that he complied with such instructions.

Fifth: That thereafter Defendant refused to honor Plaintiff's claim for compensation and reimbursement of medical expense.

Sixth: That Defendant's promises were false and fraudulent and made for the purpose and with the intent of defrauding Plaintiff.

Seventh: That he received no consideration for the execution of said release."

The cause came on for trial on May 29, 1949 and the jury, after long deliberation, was discharged because of failure to reach a verdict. During trial and over objection, Petitioner filed an amended reply in which he said:

"First: Same as 'a' above.

Second: That at the time of the execution of the release, he did not know it was a full and complete release of all claims, demands, and causes of action he had against Defendant.

Third: That Hochberg represented that said release was only for the wages lost by Plaintiff to date thereof by reason of his being unable to work because of the injuries he sustained May 29, 1944.

Fourth: Same as Sixth and Seventh above."

On October 13, 1949, the cause came on for retrial, whereupon Respondent filed a demurrer to said amended reply, which was overruled. Respondent objected to proceeding to trial by jury until the validity of the pleaded release be determined, and requested that all issues of law apparent from the face of the pleadings be tried by the court, and that the validity of the release be determined by the court as a matter of law, separate and apart from, and prior to the determination of any issues of fact, all of which objections and requests were denied. Respondent also moved for judgment on the pleadings and opening statement of counsel for Petitioner, which motion was overruled, and objected to the introduction of any evidence on the ground that the Petitioner did not have a cause of action upon the face of the pleadings, which was likewise overruled. Respondent, at the close of Petitioner's evidence and all of the evidence moved for a directed verdict, which motions were overruled. The jury returned a verdict for Petitioner for \$25,000.00 with the following interrogatories and answers:

Question: If you find in favor of the plaintiff on the issue with respect to the validity of the "agreement and release" of September 5, 1944 (Exhibit 6), then state and describe the act or acts of defendant, upon which you base such finding.

Answer: We, of the jury, consider Exhibit 8 null and void since the defendant did not adhere to the validity of the "agreement and release," known as Exhibit 8, therefore, reopening the situation by continuing to make payments to the plaintiff. We find Exhibit 6 invalid because of conflicting dates September 5th and September 9th, 1944.

Question: Did plaintiff have an opportunity to read the "agreement and release" of September 5, 1944 (Exhibit 6), prior to or at the time he received a check for \$475.78.

Answer: Yes.

Question: Did plaintiff have an opportunity to read the bank check of September 5, 1944, for \$475.78 (Exhibits 12-17) between the time he received said check and the time he received payment therefor.

Answer: Yes.

Question: Was plaintiff prevented from reading the "agreement and release" of September 5, 1944. (Exhibit 6.)

Answer: No.

Question: If you find by a preponderance of the evidence that plaintiff was injured on May 29, 1944, and that such injury resulted in whole or in part from the negligence of any of the officers, agents, or employees of defendant, then state of what such negligence consisted.

Answer: The evidence of neglect is found in the fact that the plaintiff did not have immediate and the proper hospital care.

Respondent filed a motion for judgment notwithstanding the verdict, later sustained, and a motion for judgment on the special findings of fact, later overruled. Judgment was accordingly entered for Respondent, following which an appeal was taken by Petitioner to the Court of Appeals, which reversed the judgment of the Common Pleas Court. The Supreme Court of Ohio reversed the judgment of the Court of Appeals for reasons stated in its opinion.

### STATEMENT OF THE CASE.

On May 29, 1944 at 10:08 A. M., Petitioner, then fifty (50) years of age, and an experienced railroad fireman, was riding in the cab on the left side of a steam locomotive traveling westerly, about thirty (30) to thirty-five (35) miles per hour, as it approached Rushmore, Ohio. For some unknown reason the locomotive was derailed near a switch or frog, coming to a standstill on its right side. Petitioner was thrown and bounced around in the cab and then crawled out of the window of the upturned left side of the engine. He remained there a short while, then walked unassisted about one-fourth mile, to a highway, then was driven in an automobile to a doctor's office where he received first aid. He then went to a bar and had some beer, and then to his rooming house, where he slept several hours. He then had his supper and again went to a bar where he had some more beer. Later that evening he was driven in an automobile from Delphos, Ohio, to the East Akron yard of Respondent, a distance of 167 miles,—where he got his own car and drove about two miles to his home, then to bed.

The next day, around 12:40 P. M., Petitioner, at the request of Respondent's doctor, went to the Akron City Hospital for observation, where he remained until June 2nd, 1944 at 2:30 P. M. An examination revealed some "multiple contusions" (none on the left abdomen). An X-ray examination of the cervicle spine showed "definite osteo-arthritic changes of the mid-cervicle spine with an increase of the usual lordotic curve," but "no evidence of fracture or dislocation," and "there was no evidence of any fractured ribs." His condition on discharge was "good." (Exhibit No. 5, R. 123.)

On June 13, 1944, he was again examined by Respondent's doctor and O. K.'d to go back to work. He returned to work on June 15th and worked the rest of that month and also on July 1st, 3rd and 4th. He then consulted his own doctor, Dr. B. W. Shaffner (deceased at time of retrial) and

also Dr. E. M. Walker. Dr. Shaffner had him return to the hospital on July 17, 18 and 19, 1944, for X-ray examinations of the upper gastro-intestinal tract and colon, which were negative. (Exhibits Nos. 31, and 31-B, R. 270, 275.) On July 31, 1944, Respondent received Dr. Walker's negative report. (Exhibit No. 11, R. 222, 273.)

On August 31st, 1944, Petitioner again saw Dr. Shaffner, who released him to return to work on September 5, 1944 (Exhibit No. 16, R. 113, 274), which release was personally taken by Petitioner to Respondent's main office. He returned to work on September 7th, 1944 and worked the rest of that year, except for a granted vacation of six days. He worked throughout 1945 with earnings of \$2569.35; 1946 with earnings of \$2781.04, and up until April 24, 1947, with earnings of \$394.02, at which time he voluntarily quit. (Exhibits Nos. 35A to 35N, R. 238, 275.) Since that date he has been carried on Respondent's employment roll, Fireman Senior Roster, and under the rules of the Union, of which Petitioner is a member, and the rules of the company, providing he can pass the pre-requisite physical examination, is eligible for employment. Petitioner said he was off work a total of 140 days from May 29, 1944 to April 25, 1947, but did not say that this was due to a physical disability. In 1945, 1946 and 1947, he was on the extra board (low in seniority) and work started to fall off in the fall of 1945 at the end of the war.

On June 14, 1944, Petitioner went to Respondent's office and presented his longhand statement for \$84.19 for damage or loss of personal property, sustained in the accident (Exhibit No. 5, R. 217, 271), and asked that the same be paid, which, on the same date, was paid by a check payable to Petitioner's order and subsequently endorsed by him. (Respondent's Exhibit No. 6, R. 217, 272.) On the same date, he received another check for \$139.66, payable to and endorsed by him (Exhibit No. 7, R. 217, 272), which had on its face the following notation: "In full settlement for injuries received at Rushmore, 10:08 A. M. May 29,

1944." At that time he signed in duplicate an "agreement and release" with his signature affixed thereon in six different places. (Exhibit 8, R. 220, 272.)

On August 8, 1944, he again went to the main office of Respondent, after having consulted his own doctors and after having further X-rays taken, and again asked for and received a check for \$75.00, payable to his order and endorsed by him, which had on its face the following notation: "For additional partial settlement of personal injuries received at Rushmore, 10:08 A. M. on May 29, 1944" (Exhibit No. 9, R. 221, 272) and also signed a separate receipt. (Exhibit No. 10, R. 221, 272.)

On August 14 and 28, 1944, he went to the main office of Respondent, and on each occasion requested and received a check for \$75.00, payable to his order and endorsed by him, which had on its face the following notation: "For additional partial settlement of injuries received at Rushmore, Ohio at 10:08 A. M. May 29, 1944." And also signed a separate receipt. (Exhibits Nos. 12a, R. 223, 273; 13, R. 223, 274; 14, R. 218, 274; 15, R. 224, 274.)

On September 5, 1944, Petitioner again voluntarily went to the office of A. W. Hochberg, not an official or director of Respondent, but a Chief Clerk to H. G. Watkins, Respondent's Vice-President in charge of Operations. At this time, Petitioner gave to Mr. Hochberg, Dr. Shaffner's O. K. to return to work (Exhibit No. 16, R. 113, 274), and told him "I'm ready to go back to work." Whereupon, after about an hour an "agreement and release" was prepared, and signed in duplicate, by Petitioner in six separate places. (Exhibits 6 and 18—R. 5, 125, 165, 147, 274.) At this time, Petitioner was given a check for \$475.78, payable to his order and later endorsed by him, which had on its face: "In full settlement account of injury received at Rushmore, Ohio; 10:08 A. M. on May 29, 1944." On the back of the check and above the endorsement of Petitioner appeared the following: "This voucher check is a payment in full of the within account, and it is agreed that the payee's

*endorsement thereon shall constitute the acknowledgment of such payment.*" (See Exhibit 12, R. 273.) Petitioner had this check in his possession for about twenty-four hours before he cashed it. (R. 150.)

The conversation between Petitioner and Hochberg, appears in the record at pages 128 to 149 inclusive; 153, 234, 236; 252, 257, 258, 262.

Petitioner's total wages for 1944 amounted to \$2476.92, of which \$191.56 was withheld for Federal Income Tax, as evidenced by a required Withholding Receipt, Form W2. (Exhibit No. 39—R. 227, 275.) This amount did not include the payments of \$84.19; \$139.66; the three of \$75.00 each, and the \$475.78. Petitioner did not pay any Federal Income Tax on this aggregate amount of \$924.63, nor did Respondent report or withhold under the Federal Railroad Retirement Law; anything therefrom for tax purposes. (Exhibits Nos. P. R. 1 to No. P. R. 21—R. 239, 275.) Petitioner's pay checks for 1944 (Exhibits P. C. Nos. 1 to P. C. No. 22—R. 225, 275) differed in form, language and style from the checks used in payment of the \$924.63. His pay checks were accompanied by stubs showing total earnings and deductions therefrom, but the other checks did not have any such stubs.

Under an agreement between Respondent and the Firemen's Union (Exhibits No. 24 and No. 24a, R. 265, 267, 275), Petitioner was required to take certain examinations for promotion to Engine-man, and if he failed to pass such examinations he went to the foot of the Firemen's Roster. Petitioner was eligible to take such examinations and before April 24, 1947, had passed the oral part thereof. On April 24, 1947, he voluntarily started to take the written part of the examination but quit before it was finished. (Exhibit No. 27—R. 156, 275.) He never made any request to complete the examination nor has he ever been denied an opportunity to complete the examination but on the contrary, started this action on May 21, 1947. *At no time prior to the time of the filing of his first reply, to-wit: August 4, 1947, did*

he ever complain of or charge anyone connected with the Respondent of any fraud, misrepresentation, or breach of any promises, nor did he offer to make any tender of any of the \$924.63 until after the filing of Respondent's answer.

Petitioner first attempted to say that he could not read, but this was absolutely refuted. He also attempted to say that at no time did he read what he signed, notwithstanding he voluntarily affixed his signature fifteen times to agreements, releases and receipts and endorsed six checks payable to his order. He in writing said that he understood the contents of the agreements and releases and that the affixing of his signature was his free and voluntary act and that he received the sums therein mentioned in full satisfaction of the obligation of Respondent to him under the provisions of the contract. He also attempted to say that he did not read the checks which he received, notwithstanding the last check for \$475.78 was in his possession for some twenty-four hours before being cashed.

We do not have a case where a claimant could not read, nor write, did not have an opportunity to read, could not see to read, was prevented from reading, or where a release was misread. (See findings of fact by Jury, R. 19, 20.) There was no evidence that Petitioner in September, 1944, was mistaken as to the nature and extent of any injury he had received or that he went back to work under any mistake of fact either on his part or on the part of Respondent or upon any false promises by Respondent. There was no evidence that he was not informed or was misinformed about his physical condition in September 1944. He was not induced to go back to work at the request of the Respondent. He made no statement with regard to any undisclosed physical condition. There was no competent evidence that the "tumorous mass in the lower left groin" or the "neuritis" as found by his doctor on May 1, 1949, was a direct and proximate result of the accident of May 29, 1944, nor that he had such a condition in September, 1944. There was no

evidence that in September, 1944, Petitioner was suffering from a substantial or severe injury from which recovery was doubtful. His work record and earnings from September 5, 1944 to the date he terminated his employment, indicate that for this period of time he was not physically disabled.

### ARGUMENT.

**I.** Certiorari should be denied because, (a) the State Court did not decide a Federal question of substance not theretofore determined by this Court, nor did it decide any question in a way probably not in accord with applicable decisions of this Court; (b) the validity of a Federal or State statute is not drawn in question; (c) the State Court did not deny "A right, privilege or Immunity" claimed under the Constitution or Statutes of the United States; (d) there is no conflict between the interpretations of Ohio Courts and Federal Courts on the common law relating to the subject of releases; and (e) there are no special and important reasons therefor.

Herein the Ohio Supreme Court simply held that under the pleadings and evidence of the case, the trial Court had the right to determine, under the Ohio law, the validity of an Ohio contract of release executed by an Ohio employee to an Ohio employer, of rights arising under the Federal Employer's Liability Act. The State Court did not decide any Federal question of substance not theretofore determined by this Court, nor did it decide any question in a way not in accord with the applicable decisions of this Court. The validity of a Federal or State statute was not drawn in question. The State Court did not deny a right, privilege or immunity claimed under the constitution or statutes of the United States. There is no conflict between the interpretations of the Ohio Courts and Federal Courts on the common law relating to the subject of releases, and the Ohio decision does not give rise to any such conflict.

The decision of the State Court was based upon a non-Federal ground, adequate and substantial to support it.

The fact that Petitioner contended "the question as to whether the release of an employee's claim under the Federal Employer's Liability Act should be set aside for fraud or mistake, must always be determined by the law as announced by the Federal Courts," did not deny the State Court the right to decide the case on a non-Federal ground. Even though the Court considered the Federal Employer's Liability Act and concluded as this Court did in *Callen vs. Pennsylvania Railroad Company*, 332 U. S. 625, 92 L. ed. 242, that "the releases of railroad employees stand on the same basis as the releases of others," still this does not warrant or require this Court to review the State Court decision. The State Court's decision does not run counter to any law as announced by Federal Courts.

The State Court in deciding this case did not do so under any local rule of practice, but based its decision upon substantive rules of common law, recognized by both Ohio and Federal Courts.

It is a well established principle of this Court, that before it will review a decision of a State Court, it must affirmatively appear from the record that the Federal question was presented to the highest court of the state having jurisdiction, and that its decision of the Federal question was necessary to its determination of the cause. And where the decision of a State Court might have been either on a State ground or on a Federal ground and the State ground is sufficient to support the judgment, this Court will not undertake to review it. *Williams vs. Kaiser*, 323 U. S. 471, 89 L. ed. 398.

This Court has also held that it will not review a State decision resting on an adequate and independent non-Federal ground, even though the State Court may have also summoned to its support an erroneous view of Federal

law, and further that where a State Court's decision rests both on its determination of a Federal question and on an adequate and independent non-Federal ground, it is not for this Court to consider the correctness of the non-Federal ground unless it is an obvious subterfuge to evade consideration of a Federal issue. *Radio Station WOW, Inc. vs. Johnson*, 326 U. S. 120, 89 L. ed. 2092; *Hammerstein vs. Superior Court of California*, ..... U. S. ...., 95 L. ed. 450; *Flournoy vs. Wiener*, 321 U. S. 253, 88 L. ed. 708; *Young vs. Ragen*, 337 U. S. 235, 93 L. ed. 1333.

It has also been held that it is essential to the jurisdiction of this Court, in reviewing a decision of a court of a state, that it must appear affirmatively from the record, not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *Lynch vs. N. Y.*, 293 U. S. 52, 79 L. ed. 191.

The Federal Employer's Liability Act does not deny railroad employees and employers the right to settle their differences without litigation. *Callen vs. Pennsylvania Railroad Company*, *supra*. *Duncan vs. Thompson*, 315 U. S. 1, 86 L. ed. 575.

The fact that the release was of a right given by Federal statute did not preclude the court from determining the validity of such release under any applicable State Law. *Regents of Georgia vs. Carroll*, 338 U. S. 586, 94 L. ed. 363.

2. The Supreme Court of Ohio did not err in deciding that the Trial Court (the Common Pleas Court) had the right to determine, under the pleadings and the evidence of the case, the issue as to whether an employee of a railroad was induced by fraud (other than fraud in the factum) or by mistake to execute a release of his claim arising under the Federal Employer's Liability Act.

At the outset, it will be noted that none of the Ohio Courts found any fraud in the factum or any mutual mistake. The trial Court found that "the facts do not sustain either in law or in equity the allegations of fraud by clear, unequivocal and convincing evidence," and the Supreme Court said, "There was substantial evidence to sustain the finding for the defendant by the Court on that issue"—"whether the plaintiff was induced by fraudulent representation of the defendant or by mistake to execute the release." *It will also be noted that the jury's findings of fact (R. 19, 20) did not indicate anything which would or could invalidate Petitioner's release.*

Upon original trial and retrial, Petitioner insisted that under *Perry vs. M. O'Neil & Company*, 78 O. S. 200, and *Flynn vs. Sharon Steel Corporation*, 142 O. S. 145, the case had to be submitted to the jury. It was not then contended that the Federal law had any application to the release, but in the reviewing courts, *Petitioner contended that the issue of fraud or mistake in the execution of a release in an action under the Federal Employer's Liability Act was for the exclusive determination of the jury regardless of the record.* The Ohio Trial and Supreme Courts did not agree with this contention. In none of the Ohio courts nor in this Court has Petitioner cited any authority for his contention that releases of a railroad employee running to a railroad employer, of rights arising under the Federal Employer's Liability Act, stand on a different basis than releases of others. At no time has it been pointed out and it is not now pointed out to this Court, that there is any conflict, in the

interpretation of the common law of releases, between Ohio Courts and Federal Courts. There is no such conflict. The cases cited by Petitioner, as reasons for granting the writ herein, are simply cases in which the courts felt that under the issues and the evidence thereof, a jury issue was presented on the question of the validity of a release. They do not hold that in every case where there is an issue as to the validity of a release such issue must be submitted to a jury. The facts of each of the cases cited are distinguishable from the facts of the instant case.

There is no conflict between the decisions of the State Court and the Federal Courts on the subject of releases. The common law as interpreted by the Ohio Courts is consistent with the common law as interpreted by the Federal Courts. In the instant case the release was not void and the most that could be said it was voidable. We do not know of any Federal rule that there is no distinction between a release that is void and one voidable. Federal Courts have not wiped out the distinction between equitable issues and issues at law, nor changed the procedure for disposing of equitable defenses. Neither they nor Congress have prescribed any special procedure for the determination of the validity of the release of a railroad employee, as distinguished from the release of any other person.

It is a well known rule that "where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and if an issue of law remains it is triable to a jury."

*Radio Corporation vs. Raytheon Mfg. Co.*, 296 U. S. 459, 80 L. ed. 327; *Liberty Oil Company vs. Condon National Bank*, 260 U. S. 235, 67 L. ed. 232. (Citing Ohio cases): *American Mills Company vs. American Surety Company*, 260 U. S. 360, 67 L. ed. 306; *Meyer vs. Meyer*, 153 O. S. 408; *Pickensimer vs. B. & O. R. R. Co.*, 151 O. S. 1.

At the beginning of re-trial, Respondent raised the question of the sufficiency of Petitioner's amended reply

and objected to proceeding to trial until the validity of the release was first determined, as a matter of law, separate and apart from the determination of any issues of fact. Under either Ohio General Code, Section 11379 providing "Issues of law must be tried by the Court, unless referred as hereinafter provided. \* \* \*," or the Federal law, the issues of law raised by the pleadings were properly for determination by the court. The Federal law is quite clear on this subject. *Hill vs. Northern Pacific Ry. Co.*, 104 Fed. 754; *Hoad vs. N. Y. C. & R. Co.*, 6 F. S. 565, 3 F. S. 1020; *Ross vs. Service Lines Inc.*, 31 F. S. 871; *Cavender vs. Virginia Bridge & Iron Co.*, 257 Fed. 877; *Union Pacific R. Co. vs. Syas*, 246 Fed. 561; *Fay vs. Hill*, 249 Fed. 415; *Pringle vs. Storrow*, 9 Fed. 2nd 464.

The Ohio law is quite clear that if a release is not void but only voidable, the releasor cannot maintain an action for the original wrong until the release is set aside, *Perry vs. O'Neil & Co. supra*; *Jackson vs. Ely*, 57 U. S. 450; *Cassidy vs. Cassidy*, 57 O. S. 382; *T. & O. C. Ry. Co. vs. Coleman*, 12 O. C. C. ns. 497, affirmed without opinion, 81 O. S. 522. We do not know of any Federal Rule to the contrary.

If the Court had the right to submit the question of the release to the jury, then under both Ohio and Federal law, the general verdict was not binding upon the court and the Court had the right to consider all the evidence and the special findings of the jury as advisory and enter judgment accordingly. *(American) Lumbermen's Mutual Casualty Co. of Illinois vs. Timms & Howard Inc., et al.*, 108 Federal 2nd 497; *Federal Reserve Bank vs. Idaho*, *Grimm Alfalfa Seed Association*, 8 Federal 2nd, 922, certiorari denied; *Perkins vs. Prudential Insurance Co. of America*, 69 Fed. 2nd, 218; *Idaho & Oregon Land Improvement Co. vs. Bradbury*, 132 U. S. 509; 33 L. ed. 433; *Kohn vs. McNulta*, 147 U. S. 238, 37 L. ed. 150; *Dunphy vs. Kleinschmidt*, 78 U. S. 610, 20 L. ed. 223; *Perego vs. Dodge*, 163 U. S. 160, 41 L. ed. 113.

The *Bradbury* case, *supra*, holds:

"6. In an equity suit, the court may disregard the verdict and findings of a jury upon issues of fact submitted to them, either by setting them or any of them aside, or by letting them stand, and allowing them more or less weight in its final hearing and decree, according to its own view of the evidence in the cause. It is not necessary that a court of equity should formally set aside the verdict or finding of a jury, before proceeding to enter a decree which does not conform to it."

When a court of equity calls a jury it is only for the purpose of enlightening its conscience and not to control its judgment. *Quimby vs. Conlan*, 104 U. S. 420, 26 L. ed. 800; *Basey vs. Gallagher*, 20 Wall. 670, 22 L. ed. 452.

In a suit for damages under the Federal Employer's Liability Act, the burden of showing alleged fraud vitiating the contract of compromise and release, rests upon the parties attacking the release. *Callen vs. Pennsylvania Railroad Co. supra*; *Collette vs. L. & N. R. Co.*, 81 Fed. Sup. 428 (District Court of Illinois).

Fraud is never presumed. The Ohio and Federal Courts have uniformly held fraud is an affirmative defense to be established by clear, unequivocal, satisfactory and convincing proof, rather than mere preponderance of evidence. This rule was recognized by the Circuit Court of Appeals in the *Callen* case, 162 F. 2nd 832, as pointed out by Judge Taft in the Ohio decision. The Ohio decision is in keeping with other decisions upholding releases, as shown by the following:

*Upton, Assignee vs. Tribilcock*, 91 U. S. 45, 23 L. ed. 203;

*George vs. Tate*, 102 U. S. 564, 26 L. ed. 232;

*Andrus vs. St. L. S. & R. Co.*, 130 U. S. 643, 32 L. ed. 1054;

*C. & N. Ry. Co. vs. Wilcox*, 116 Fed. 913;

*N. Y. C. & H. R. R. Co. vs. Difendaffer*, 125 Fed. 893;

*Wagner vs. National Life Insurance Co.*, 90 Fed. 395;  
*Nason vs. C. R. I. & P. Ry. Co.*, 118 N. W. 751, Iowa;  
*Douda vs. C. R. I. & P. Ry. Co.*, 119 N. W. 272, Iowa;  
*Albrecht vs. Milwaukee & L. Ry. Co.*, 58 N. W. 72,

Wisc.;

*Blossi vs. C. & N. Y. Ry. Co.*, 123 N. W. 360, Iowa;

*Whitney Co. vs. Johnson*, 14 Fed. 2nd 24;

*Reinhardt vs. Weyerhaeuser Timber Co.*, 47 F. S.  
 335;

*Stumpf vs. Stumpf*, 28 Ohio Law Abstract 479;

*T. & O. C. Ry. Co. vs. Coleman*, 12 O. C. C. ns. 497,  
 affirmed without opinion, 81 O. S. 522.

The following cases are worthy of consideration in their  
 entirety:

*Chicago St. P. M. & D. Ry. Co. vs. Belliwith*, 83 Fed.  
 437;

*Heck vs. Missouri P. Ry. Co.*, 147 Fed. 775;

*Hill vs. N. P. Ry. Co.*, 104 Fed. 754;

*Gladish vs. Penn. Co.*, 107 Fed. 61;

*Spitze vs. B. & O. R. R. Co.*, 23 A. 307, Md.;

*Rader vs. Lehigh Valley R. Co.*, 26 Fed. 2d 73;

*Yocum vs. Chicago R. I. & P. Ry. Co.*, 249 N. W. 672,  
 Minn.

A case containing facts similar to those of the instant  
 case is *Merwin vs. N. Y., N. H. & H. R. Co.*, 62 Fed. 2nd 803,  
 N. Y. C. C. A.

### CONCLUSION.

The respondent submits that the petition for a writ of  
 certiorari should be denied.

Respectfully submitted,

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1951.**

**No. 374.**

**JOHN F. DICE,**  
*Petitioner,*

*v.*

**THE AKRON, CANTON & YOUNGSTOWN RAILROAD  
COMPANY,**  
*Respondent.*

**ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF OHIO.**

**BRIEF FOR THE RESPONDENT.**

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## **OPINIONS BELOW.**

The opinion of the Supreme Court of Ohio is reported in 155 Ohio State Reports 185, 98 N. E. 2d 301. The opinions of the Court of Appeals of Summit County, Ohio, the intermediate appellate court, and of the Common Pleas Court of Summit County, Ohio, the trial court, both unreported, are appended to petitioner's brief.

## **JURISDICTION.**

Petitioner duly filed a petition for a writ of certiorari to the Supreme Court of Ohio invoking jurisdiction under Section 929 (3) of the Judiciary Act of June 25, 1948, 28 U. S. C. 1257 (3), which was granted October 8, 1951.

### QUESTIONS PRESENTED.

1. Did the Supreme Court of Ohio err in deciding that questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in Ohio and questions as to the avoidance of such a release are to be determined in the Ohio courts by the law of Ohio?

2. Did the Supreme Court of Ohio err in deciding (a) that the trial court (the Common Pleas Court) had the right to determine the issue as to whether petitioner was induced by fraud (other than fraud in the factum) or by mistake to execute a release of his claim arising under said Act, and (b) that there was substantial evidence to support the trial court's finding that the facts did not sustain, either in law or in equity, the allegations of fraud by clear, unequivocal and convincing evidence?

At page 4 of his brief, under the heading "Questions Presented," petitioner states that two primary or fundamental questions are presented, in both of which he assumes that there is fraud in the factum and fraud in the inducement. None of the Ohio courts found any fraud in the factum. Respondent submits there is no basis in the record or in the decisions of the three Ohio courts for a claim of fraud in the factum.

### STATUTES INVOLVED.

Section 51 of the Federal Employers' Liability Act, Title 45 U. S. C.; Section 1652, The Rules of Decision Act, Title 28 U. S. C.

Petitioner's brief (p. 5) also includes, under the heading "Statutes Involved," Section 55 of the Federal Employers' Liability Act and Section 688 of the Jones (Merchant Marine) Act, Title 46 U. S. C. However, Section 688 is not involved, and Section 55 is not controlling, as will hereafter appear.

**HISTORY.**

Since a statement of the course taken by the proceedings in the state courts, as well as of the facts, becomes necessary to determine whether the judgment of the Ohio Supreme Court should be affirmed by this Court, attention is directed thereto.

On May 21, 1947, petitioner commenced an action in the Common Pleas Court of Summit County, Ohio, against respondent, to recover \$50,200.00 for personal injuries and expenses, arising out of an accident which occurred on May 29, 1944, when a locomotive, upon which he was working as a fireman, was derailed. He described his injuries as:

"bruises and contusions all over his entire body, particularly in the region of his lower left abdomen (or groin); internal injuries and severe traumatic shock;" (R. 2).

Respondent's answer admitted that at the time of accident the parties were engaged in interstate commerce; there was a derailment of the locomotive upon which petitioner was engaged as a fireman; and that he sustained some injuries, but denied any negligence upon its part. As a second defense it pleaded an agreement and release dated September 5, 1944, executed by petitioner, and payment of \$924.63 to petitioner as a full and complete settlement and release of petitioner's claims. (See Pet. Ex. 6; R. 5-7, 165; and Resp. Ex. 18; R. 147, 274-275.) On August 4, 1947, petitioner filed a reply alleging facts which he contended made the release null and void (R. 8-9).

The cause came on for trial on May 29, 1949 and the jury, after long deliberation, was discharged because of failure to reach a verdict (R. 16-17). During trial and over objection, petitioner filed an amended reply in which he said (R. 10-11):

"Plaintiff admits that in September, 1944 he received some money from the defendant, the exact amount thereof being particularly within the knowledge of the defendant, but denies that the receipt thereof constituted a full and complete settlement of all of his claims against the defendant company. Plaintiff says that in September, 1944 when he reported back to work, one A. W. Hockberg, Chief Clerk for the defendant company, informed him that it would be necessary to sign a paper releasing the defendant company from all claims for loss of time and medical expenses up to that date before he could go back to work and that he relied on said promises and representations.

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"By way of further reply, this plaintiff says that at the time of the execution of said purported release, he had no knowledge that said release was a full and complete release of all of his claims against the defendant corporation, but says that one, A. W. Hockberg, Chief Clerk of the defendant corporation, represented to this plaintiff that said purported release was a release only for the wages lost by this plaintiff to the date thereof, by reason of his being unable to work by reason of the injuries he had sustained on or about May 29th, 1944, and that said representation was false, fraudulent and was relied on by the plaintiff."

The history of the case upon and subsequent to retrial is correctly stated by petitioner, but in connection therewith, respondent wishes to add that the jury with its general verdict, made special findings, including the following (R. 19-20):

Question: If you find in favor of the plaintiff on the issue with respect to the validity of the "agreement and release" of September 5, 1944 (Exhibit 6), then state and describe the act or acts of defendant, upon which you base such finding.

Answer: We, of the jury, consider Exhibit 8 null and void since the defendant did not adhere to the validity of the "agreement and release," known as Exhibit 8, therefore, reopening the situation by continuing to make payments to the plaintiff. We find Exhibit 6 invalid because of conflicting dates Sept. 5th and Sept. 9th, 1944.

#### STATEMENT OF THE CASE.

On May 29, 1944 at 10:08 A. M., petitioner, then fifty (50) years of age, and an experienced railroad fireman, was riding in the cab on the left side of a steam locomotive traveling westerly, about thirty (30) to thirty-five (35) miles per hour, as it approached Rushmore, Ohio (R. 40, 41, 103). For some unknown reason the locomotive was derailed near a switch or frog, coming to a standstill on its right side (R. 43, 187, 210). Petitioner was thrown and bounced around in the cab and then crawled out of the window of the upturned left side of the engine (R. 46-47). He remained there a short while, then walked unassisted about one-fourth mile, to a highway, then was driven in an automobile to a doctor's office where he received first aid (R. 48). He then went to a bar and had some beer, and then to his rooming house, where he slept several hours (R. 48-49). He then had his supper (R. 49) and again went to a bar where he had some more beer (R. 49, 109-110). Later that evening he was driven in an automobile from Delphos, Ohio, to the East Akron yard of respondent, a distance of 167 miles,—where he got his own car and drove about two miles to his home, then to bed (R. 49-50, 110).

The next day, around 12:40 P. M., petitioner, at the request of respondent's doctor, went to the Akron City Hospital for observation, where he remained until June 2nd, 1944 at 2:30 P. M. (R. 110-111). An examination

revealed some "multiple contusions" (none on the left abdomen) (Pet. Ex. 5; R. 123). An X-ray examination of the cervical spine showed "definite osteo-arthritis changes of the mid-cervical spine with an increase of the usual lordotic curve," but "no evidence of fracture or dislocation," and "there was no evidence of any fractured ribs." His condition on discharge was "good" (Pet. Ex. 5; R. 123).

On June 13, 1944, he was again examined by respondent's doctor and O.K.'d to go back to work (R. 112). He returned to work on June 15th and worked the rest of that month and also on July 1st, 3rd and 4th (R. 112). He then consulted his own doctor, Dr. B. W. Shaffner (deceased at time of retrial), and also Dr. E. M. Walker (R. 113). Dr. Shaffner had him return to the hospital on July 17, 18 and 19, 1944, for X-ray examinations of the upper gastro-intestinal tract and colon, which were negative (R. 112, 221, 222; Resp. Ex. 11; R. 222, 273). On July 31, 1944, respondent received Dr. Walker's negative report (Resp. Ex. 11; R. 222, 273).

On August 31, 1944, petitioner again saw Dr. Shaffner, who released him to return to work on September 5, 1944, which release was personally taken by petitioner to respondent's main office (Resp. Ex. 16; R. 113, 274). He returned to work on September 7, 1944 and worked the rest of that year, except for a granted vacation of six days (R. 114). He worked throughout 1945, with earnings of \$2569.35; 1946, with earnings of \$2781.04; and up until April 24, 1947, with earnings of \$894.02, at which time he voluntarily quit (Resp. Exs. 35-A to 35-N; R. 114-115, 117, 157, 238, 275). Petitioner said he was off work a total of 135 days between May 29, 1944 and April 25, 1947, but did not say that this was due to physical disability. Petitioner was on the extra board (low in seniority) at time of accident and continued thereon to the time he terminated his employment (R. 101).

On June 14, 1944, petitioner went to respondent's office with his longhand statement for \$84.19 for damage or loss of personal property sustained in the accident (Resp. Ex. 5; R. 217, 271), and asked that the same be paid, which was then paid by check, later endorsed by him (Resp. Ex. 6; R. 217, 272). On the same date, he received another check for \$139.66, later endorsed by him (Resp. Ex. 7; R. 219, 272), which had on its face the following: "In full settlement for injuries received at Rushmore, 10:08 A. M. May 29, 1944." At that time he signed in duplicate an "agreement and release" with his signature affixed thereon in six different places (Resp. Exs. 8, 8a; R. 220, 272).

On August 8, 1944, he went to respondent's office, after having consulted his own doctors and having further X-rays taken, and again asked for and received a check for \$75.00, later endorsed by him, which had on its face the following: "For additional partial settlement of personal injuries received at Rushmore, 10:08 A. M. on May 29, 1944" (Resp. Ex. 9; R. 221, 272); and he also signed a separate receipt (Resp. Ex. 10; R. 221, 272).

On August 14 and 28, 1944, he went to respondent's office and on each occasion requested and received a \$75.00 check, later endorsed by him, each of which had on its face the same notation as the check of August 8, 1944; and he also signed a separate receipt (Resp. Exs. 12a, 13, 14, 15; R. 218, 223, 224, 273, 274).

On September 5, 1944, petitioner went to the office of A. W. Hochberg, Chief Clerk. At this time petitioner gave to Mr. Hochberg, Dr. Shaffner's O.K. to return to work (Resp. Ex. 16; R. 113, 114, 274), and told him "I'm ready to go back to work" (R. 133-134). Whereupon, after about an hour, an "agreement and release" was prepared, and was signed in duplicate by petitioner in six separate places

(Pet. Ex. 6; Resp. Ex. 18; R. 5, 125, 146, 147, 165, 274). Petitioner was then given a check for \$475.78, later endorsed by him, which had on its face: "*In full settlement account of injury received at Rushmore, Ohio, 10:08 A. M. on May 29, 1944*" (R. 148-151). On the back of the check and above the petitioner's endorsement appeared the following: "*This voucher check is a payment in full of the within account, and it is agreed that the payee's endorsement thereon shall constitute the acknowledgment of such payment.*" (Resp. Ex. 13; R. 273.) Petitioner had this check in his possession for about twenty-four hours before he cashed it (R. 150).

The conversation between petitioner and Hochberg appears in the record at pages 128 to 149, inclusive, 153, 234, 236, 252, 257, 258, 262.

Petitioner's 1944 wages amounted to \$2476.92, of which \$191.56 was withheld for income tax, as evidenced by a required withholding receipt, Form W2 (Resp. Ex. 39; R. 227, 275). This amount did not include the \$924.63, and petitioner did not pay any income tax on the same, nor did respondent report or withhold anything therefrom under the Railroad Retirement Act (Resp. Exs. P. R. 1 to P. R. 21; R. 228-229, 238-239, 275). Petitioner's 1944 pay checks (Resp. Exs. P. C. 1 to P. C. 22; R. 225, 275) differed in form, language and style from those used in payment of the \$924.63. His pay checks had stubs showing total earnings and deductions therefrom, but the others had no such stubs (R. 237).

Under an agreement between respondent and the firemen's union (Resp. Exs. 24 and 24a; R. 265, 267, 275), petitioner was required to take certain examinations for promotion to engineman, and if he failed to pass he went to the foot of the firemen's roster (R. 94). Petitioner, before April 24, 1947, had passed the oral part thereof (R.

94), and on that date started to take the written part of the examination, but quit before it was finished (Resp. Ex. 27; R. 156-157, 275). He never made any request to complete the examination, nor has he been denied an opportunity to complete it. He started this action on May 21, 1947 (R. 157). At no time prior to the time of the filing of his first reply, to-wit: August 4, 1947, did he ever complain of or charge anyone connected with the respondent of any fraud, misrepresentation, or breach of any promises, nor did he offer to make any tender of any of the \$924.63 until after the filing of respondent's answer (R. 157, 276-277).

Petitioner said (R. 139, 147-149, 150, 151, 153, 218, 221, 223) that he did not read what he signed, notwithstanding he affixed his signature fifteen times to agreements, releases and receipts and endorsed six checks.

The record does not show that petitioner could not read or write, did not have an opportunity to read, could not see to read, or was prevented from reading. (See special findings by jury, R. 19, 20.) There was no evidence that petitioner in September, 1944, was mistaken as to the nature and extent of any injury he had received or that he went back to work under any mistake of fact, either on his part or on the part of respondent, or upon any false promises by respondent. There was no evidence that he was not informed or that he was misinformed about his physical condition in September, 1944. He was not induced to go back to work at the request of the respondent. He made no statement with regard to any undisclosed physical condition. There was no competent evidence that the "tumorous mass in the lower left groin" or the "neurosis" as found by his doctor on May 1, 1949, was a direct and proximate result of the accident of May 29, 1944, nor that he had such a condition in September, 1944 (R. 62,

67, 68). There was no evidence that in September, 1944, petitioner was suffering from a substantial or severe injury from which recovery was doubtful.

The record does not show that the derailment was due to any negligence. Respondent, after investigation, was unable to determine the cause of derailment and so reported to the Interstate Commerce Commission (R. 210). Respondent offered evidence of its various inspections and care in the maintenance of equipment, etc. and the operation of the train (R. 165-217). The jury, by its special findings, found no evidence of negligence except "that the plaintiff did not have immediate and proper hospital care" (R. 20-21; Questions 6 and 7). The case was submitted to the jury under the rule of *res ipsa loquitur* (R. 302-303).

**ARGUMENT.****Summary.**

1. Neither the common law, nor the Federal or Ohio statutory law (a) prohibits an agreement of the kind and character executed by petitioner, or (b) provides that such an agreement stands on a different basis than the agreements of others. Questions as to the validity or avoidance of such an agreement are to be determined by the common law of the forum where the agreement was made, and the federal courts are bound to follow the decisions of the appropriate state court. There is no federal general common law.

The validity of such an agreement does not depend upon the Federal Employers' Liability Act and applicable principles of common law as interpreted by federal courts, to the exclusion of the law of the State in which the agreement was made. Such applicable principles are to be found exclusively in the law of the forum.

Such an agreement is not a device to exempt from liability under Section 55 of the Federal Employers' Liability Act, but is a means of compromising a claimed liability. The Jones Act has no application, since the wardship theory of seamen has not been extended to non-maritime employees.

Questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in Ohio and questions as to the avoidance of such a release are to be determined in the Ohio courts by the law of Ohio.

2. Public policy favors settlement of controversies as conducive to termination of litigation, and a release is a means of comprising a claimed liability. In determining the validity of a release, both Federal and Ohio courts have

distinguished between fraud in the factum and fraud in the inducement. Section 55 of the Federal Employers' Liability Act does not prohibit or render invalid an agreement, of the kind and character executed by petitioner, nor does it wipe out the distinction between a void release and a voidable release.

The circumstances of the execution of petitioner's release of September 5, 1944 do not support any claim of fraud in the factum. Petitioner did not sustain the burden of establishing his claim of fraud in any respect by clear, unequivocal, satisfactory and convincing evidence. He was bound by the terms of the release, as he could read, had an opportunity to read, and was not prevented from reading. Petitioner's conduct showed a lack of care and diligence precluding his claim of fraud and misrepresentation.

The action of the trial court did not impinge upon the limitations of the Seventh Amendment to the Constitution of the United States.

Where an equitable defense is interposed to a suit at law the equitable issue should be first disposed of as in a court of equity, and if an issue of law remains, it is triable to a jury. Under Ohio law, if a release is not void but only voidable, the releaser cannot maintain an action for the original wrong until the release is set aside. Under both Ohio and Federal decisions, the action of the jury on the question of the validity of petitioner's release was not binding upon the court, and the court had the right to consider all the evidence and the special findings of the jury as advisory and enter judgment accordingly.

The jury's findings of fact did not indicate that respondent was guilty of fraud or misrepresentation, as charged, and such findings were of no force and effect in support of the general verdict of the jury.

The Ohio courts, in upholding the release, did not do so under any local rule of practice or procedure but followed the substantive law of Ohio.

The decision of the Ohio Supreme Court is controlling and should be upheld under the provisions of the Federal Rules of Decision Act. The fact that petitioner's release was of a right given by a Federal statute did not preclude the Supreme Court of Ohio from determining the validity of such release under the applicable State law.

- I. The Supreme Court of Ohio correctly decided that questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in Ohio and questions as to the avoidance of such a release are to be determined in the Ohio Courts by the law of Ohio.

Neither the common law, as interpreted by Federal or Ohio courts, nor the Federal or Ohio statutory law, prohibits a railroad employee, suffering injury while employed by a common carrier by railroad, from entering into an agreement with such carrier, adjusting, compromising or settling a claim for damages for such injury. There is nothing in the common law, as interpreted by Federal or Ohio courts, nor in Federal or Ohio statutory law, holding or providing that such an agreement stands on a different basis, or that the validity thereof is to be determined by different standards, than the agreements of others. Nor is there any Federal or Ohio law prescribing the form or execution of such an agreement.

In *Erie R. Co. v. Tompkins*, 304 U. S. 64, it is said at page 78:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the

law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the Federal courts."

It follows from the foregoing that questions related to the validity or avoidance of such an agreement are to be determined by the law of the forum (the State) where that agreement was made.

Regardless of whether the question of the applicability of the state law arises in an action at law or in a suit in equity, the Federal courts are bound to follow the decisions of the appropriate state court, even in the absence of state statute. *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 205.

Petitioner, in the first heading of his Argument (p. 12) states his contention that the validity of such a release is controlled by the law as found and interpreted by Federal courts, and not the law of the forum. Later on the same page he states that in order to secure uniformity in the administration of rights and obligations arising under the Federal Employers' Liability Act, it has been the policy of this Court that Federal Court decisions should control, both as to the interpretation of the Act and as to the applicable common law. However, as petitioner admits, the two decisions of this Court there cited as announcing this policy did not involve the validity of a release. Such policy does not comprehend the proposition that the validity of an agreement of adjustment, compromise or settlement of claims for personal injury arising under the Act depends upon the Act and applicable principles of common

law as interpreted by Federal courts, to the exclusion of the law of the state in which such agreement was made. Where are such applicable principles of common law found? In the absence of statute or Federal general common law, are they not found in the state where such an agreement was made?

The reasoning of this Court in *Erie Railroad Company v. Tompkins*, *supra*, requires the conclusion that such applicable principles of common law are to be exclusively found in the state of the forum, the place of agreement.

Petitioner's contention presupposes that the common law of release has some Federal source, as distinguished from a State source, and that there is a difference between the two. Under this argument this Court is asked to decide that the release of a railroad employee stands on a different basis than the releases of others. This was urged and rejected in *Callen v. Pennsylvania Railroad Company*, 332 U. S. 625, a case involving the question of the validity of the release of a railroad brakeman and the burden of establishing its validity. Mr. Justice JACKSON, delivering the opinion of the court, said (p. 630):

"If the Congress were to adopt a policy depriving settlements of litigation of their *prima facie* validity, it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted."

Petitioner's contentions, and the cases upon which he relies, spring largely from the concurring opinion of Circuit Judge Frank in *Ricketts v. Pennsylvania Railroad*

*Company*, (CCA 2) 153 F. 2d 757. Judge Hand's opinion in that case was based upon the question of the extent of the authority of Ricketts' attorney and not upon any question of fraud. In his concurring opinion, Judge Frank attempts to apply to non-maritime employees the law relative to maritime employees; particularly as laid down in *Garrett v. Moore-McCormack Co.*, 317 U. S. 239. But the only question before this Court in that case was one of burden of proof, and it is significant that Mr. Justice Black, who delivered the opinion, pointed out (p. 243) that it was not a case in which there was an effort of the state court to enforce rights claimed to be rooted in state law.

It is interesting to note the more recent views of Circuit Judge Frank in *Heagney v. Brooklyn Eastern District Terminal*, 190 F. 2d 976 (2nd Circuit 1951), as stated in his dissenting opinion (pp. 980, 982):

"Undoubtedly, an employee, like plaintiff, can effectively, for a consideration, release his rights under the federal statutes (although the Supreme Court, construing §5 of F. E. L. A., requires that such a release be most carefully scrutinized). \* \* \*

\* \* \* \* \*

"I am not saying that the State's legal rules (statutory or otherwise) concerning releases, compromises, or accords and satisfactions do not apply to plaintiff's rights under the federal statutes."

In his majority opinion in that case Judge Clark follows the holding of the *Callen* case in saying, at page 979:

"It is thus clear that 'a full compromise enabling the parties to settle their dispute without litigation' is appropriate and valid."

Petitioner cites the cases of *Thompson v. Camp*, 163 F. 2d 396; *Brown v. Pennsylvania Railroad Co.*, 158 F. 2d 795; and *Irish v. Central Vermont Ry., Inc.*, 164 F. 2d 837,

which cited and followed the opinion of Judge Frank in the *Ricketts* case; but these were decided before the *Callen* case, *supra*. The cases of *Graham v. Atchison, Topeka and Santa Fe Railway Company*, 176 F. 2d 819, and *Chicago & N. W. Ry. Co. v. Curl*, 178 F. 2d 497, as well as the Utah case of *Kirchgestner v. Denver & R. G. W. R. Co.*, 218 P. 2d 685, also cited by petitioner, were decided after the *Callen* case, but they are distinguishable from the instant case in that they involved the question of mutual mistake, and not questions of fraud or misrepresentation, or applicability of State or Federal law. The California cases of *Union Pacific Railroad Co. v. Zimmer*, 87 Cal. App. 2d 524, 197 P. 2d 363 and *Pacific Electric Ry. Co. v. Dewey*, 95 Cal. App. 2d 69, 212 P. 2d 255, cited by petitioner, were suits for declaratory judgments under state procedure and involved only the question of mutual mistake. Factually all of these cases are clearly distinguishable from the instant case.

Obviously, mutual mistake does not contain all of the elements common to fraudulent misrepresentations. The classic statement of those elements is found at pages 249-250 of this Court's opinion in *Southern Development Co. v. Silva*, 125 U. S. 247, as follows:

"The burden of proof is on the complainant, and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show by clear and decisive proof—

"First. That the defendant has made a representation in regard to a material fact;

"Secondly. That such representation is false;

"Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

"*Fourthly*. That it was made with intent that it should be acted on;

"*Fifthly*. That it was acted on by complainant to his damage; and,

"*Sixthly*. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

The trial court in the instant case said almost the same thing (R. 297).

Petitioner, in his brief (pp. 13-15), also states "the provisions of Section 55 of the Act would seem to require the extension of the above rule of uniformity to questions involving the validity of releases," admitting, however, "this Section does not prevent the making of 'a bona fide compromise' or settlement." He urges that "any such agreement must be interpreted or examined, to determine whether or not it impinges upon the restrictions of this Section"; and that "the principle of uniformity relative to seamen's releases would be equally applicable to railroad employees' releases, and particularly, in view of the explicit provisions of Section 55 thereof."

As to these contentions, unquestionably a court has the right to examine such an agreement to determine whether it is of a kind declared to be void by Section 55. But the desire for uniformity and the preservation of substantive rights does not permit the interpretation of Section 55 sought by petitioner. This is clearly shown by the following statement at page 630 of the majority opinion in the *Callen* case (332 U. S. 625):

"The plaintiff has also contended that this release violates § 5 of the Federal Employers' Liability Act which provides that any contract to enable any common carrier to 'exempt itself from any liability created by this chapter, shall to that extent be void.' 35 Stat. 66, 45 U. S. C. § 55. It is obvious that a release

is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation."

The case of *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (cited in petitioner's brief at pages 2, 14, 20 and 21) and the Jones Act have no application to the questions here presented since the wardship theory of seamen has not been extended to non-maritime employees.

In *Duncan v. Thompson, Trustee*, 315 U. S. 1, cited by petitioner in his brief at pages 13 and 14, the contract involved was not a compromise and settlement of claims, but only a step looking toward a settlement in the future, as pointed out by Mr. Justice Black at page 7 of the opinion. Obviously, this case has no application to the instant case.

II. The Supreme Court of Ohio correctly decided (a) that the trial court had the right to determine the issue as to whether petitioner was induced by fraud (other than fraud in the factum) or by mistake to execute a release of his claim arising under the Federal Employers' Liability Act, and (b) that there was substantial evidence to support his finding that the facts did not sustain, either in law or in equity, the allegations of fraud by clear, unequivocal and convincing evidence.

Since the petitioner attacks the opinion of the Supreme Court of Ohio in its entirety and argues (p. 19) that if the validity of the release is a jury issue "the evidence in this case is such that under federal law, as applied by federal courts" the trial court erred in sustaining respondent's motion for judgment notwithstanding the verdict of the jury, it is necessary to discuss not only the

court's conclusion that the trial court had the right to determine the issue of fraud, but its holding that there was substantial evidence to sustain the trial court's finding on that issue.

It has long been public policy to favor settlement of controversies as conducive to termination of litigation, and the recognized and common way to effect such settlements is by the parties entering into agreements of adjustment, compromise and settlement. And as Mr. Justice Jackson said in the *Callen* case, at page 630, "a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility." And whether the question of such validity is for the court or the jury, in considering the validity of such an agreement the Ohio courts have consistently distinguished fraud in the factum from fraud in the inducement, and have held that fraud in the factum renders an agreement null and void, while fraud in the inducement may avoid an agreement. Judge Taft in his opinion, at pages 190 and 191, states the Ohio law and cites the leading Ohio cases on this subject, including *Picklesimer v. B. & O. R. R. Co.*, 151 O. S. 1, *Flynn v. Sharon Steel Corp.*, 142 O. S. 145, and *Perry v. O'Neil & Co.*, 78 O. S. 200. The trial court likewise cited the *Perry* and *Flynn* cases. Since the *Perry* case is a leading Ohio case, attention is directed to the following paragraphs of the syllabus:

"1. A release of a cause of action for damages for personal injuries, that is void, is not a bar to such an action, and the plaintiff may, if it is set up by answer as a bar to his right of action, by reply aver the facts that make it void; but if it is not void, but only voidable, he cannot maintain his action until the release is set aside.

"3. If the execution and delivery of the release are admitted, the burden of proving it void is upon the releasor."

Petitioner, in the second heading of his Argument (p. 15), asserts that "The validity of such a release, where there are disputed facts with reference to the releasor being induced by fraud in factum and fraud in the inducement practiced by the releasee, is a jury issue," and in conjunction therewith urges that his cited decisions of the Courts of Appeals,<sup>1</sup> in holding that the validity of the release is a jury issue, make no distinction whatsoever between fraud in the factum, fraud in the inducement or a mutual mistake of fact. He also says that this Court has made no such distinction.

But this distinction has been long recognized by this Court and other federal courts. It is the long and firmly established rule in the national courts that issues of fraud, having to do with the execution of an instrument which the signer was led to believe was something else, are triable at law, while issues of fraud having to do with inducing execution of what the signer know to be a release, are triable in equity. Particular attention is directed to *Hartshorn v. Day*, 19 How. 211; *George v. Tate*, 102 U. S. 564; *Hill v. Northern Pacific Railway Co.*, 104 F. 754; *Union Pac. R. Co. v. Syas*, 246 F. 561, and *Pringle v. Storrow*, 9 F. 2d 464, and its citations.

This distinction is not wiped out by Section 55 of the Federal Employers' Liability Act as to releases of claims for injuries under that Act, as petitioner contends at page 16 of his brief. Section 55 says nothing about releases of compromise and settlement and does not purport to wipe out the distinction between a void release and a voidable release. See *Callen v. Pennsylvania R. R. Co.*, 332 U. S. 625, 630.

<sup>1</sup>*Ricketts v. Pennsylvania R. R. Co.*, 153 F. 2d 757; *Brown v. Pennsylvania Railroad Co.*, 158 F. 2d 795; *Irish v. Central Vermont Ry.*, 164 F. 2d 837; *Chicago & N. W. Ry. Co. v. Curl*, 178 F. 2d 497.

Petitioner states (pp. 10, 17) that when on September 5, 1944 Hochberg handed him a paper Hochberg stated that this was only a release for wages lost, that petitioner would not have to read it, that the Railroad would reopen his case in the event he suffered a recurrence (all of which was denied by Hochberg); that he accepted Hochberg's invitation not to read the release; relied upon Hochberg's representations that it was for lost wages only; and had no actual knowledge that the instrument was a general release rather than a limited one for lost wages. Petitioner contends (pp. 17-20) that these circumstances amounted to fraud in the factum as well as fraud in the inducement and presented a jury issue.

These statements of petitioner and their denial by Hochberg, standing alone, simply presented a situation in which the evidence was in equipoise. The burden was upon petitioner to establish his claim of fraud by clear, unequivocal, satisfactory and convincing evidence rather than by a mere preponderance of the evidence. Fraud is never presumed. See *Chicago, St. P., M. & O. Ry. Co. v. Belliwith*, 83 F. 437; *Merwin v. New York, N. H. & H. R. Co.*, 62 F. 2d 803; *Maxwell Land-Grant Case*, 121 U. S. 325, 381.

Petitioner's argument ignores his own neglect and failure to inform himself, as pointed out by the trial court in his finding (Petitioner's Brief, pp. 29-36). Petitioner could read, had an opportunity to read and was not prevented from reading any or all of the instruments or checks which he signed or endorsed. He was told by Hochberg that the document which was handed to him was a release (R. 234, 262). Petitioner admitted that while at Hochberg's office on September 5, 1944 he did not read or look to see what was going on there at that time (R. 146; 151).

The Court's attention is directed to petitioner's conduct in its entirety in connection with his execution of the various agreements, releases and receipts and the acceptance and endorsement of his checks, as more fully set forth in respondent's Statement of the Case, *supra*. It was not alleged, and petitioner did not prove, that he was unable to read the various instruments which he signed.

"The law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributable to indifference or credulity, nor will industrious activity in other directions, to the neglect of such means, be of any avail." *Andrus v. St. Louis Smelting Co.*, 130 U. S. 643, 647.

"It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." *Upton, Assignee, v. Tribilcock*, 91 U. S. 45, 50.

See also *Slaughter's Administrator v. Gerson*, 13 Wall 379.

Other cases of similar import which upheld releases which releasor claimed he could not or did not read are:

*N. Y. Cent. & H. R. R. Co. v. Difendaffer*, 125 F. 893; *Wagner v. National Life Ins. Co.*, 90 F. 395; *Whitney Co. v. Johnson*, 14 F. 2d 24; *Merwin v. New York, N. H. & H. R. Co.*, 62 F. 2d 803; *Reinhardt v. Weyerhaeuser Timber Co.*, 47 F. S. 335; *Chicago, St. P., M. & O. Ry. Co. v. Belliwith*, 83 F. 437; *Heck v. Missouri Pac. Ry. Co.*, 147 F. 775; *Gladish v. Pennsylvania Co.*, 107 F. 61; *Rader v. Lehigh Valley R. Co.*, 26 F. 2d 73; *Furvis v. Pennsylvania R. Co.*,

98 F. S. 212; *Chesapeake & O. Ry. Co. v. Chaffin* (C. C. A. 4, 1950), 184 F. 2d 948. See also *Chicago & N. W. Ry. Co. v. Wilcox*, 116 F. 913.

At pages 17 to 19 of his brief, petitioner takes exception to the views of the Ohio Supreme Court on the subject of fraud in the factum, and its decision that the trial court had the right to view the case as one involving fraud in the inducement and to apply equitable principles. After commenting on petitioner's failure to read the release and the interpretation of such failure made by the Supreme Court, he says that in this aspect no equitable relief is involved since neither cancellation nor reformation is required; that in this case the single question is—was there, in fact, a contract—was there a meeting of the minds. He then urges (p. 18) that "The withdrawing of the determination of these facts from the jury impinges upon the limitations of the Seventh Amendment of the Constitution of the United States, guaranteeing the right of trial by jury in common law actions for money."

The right of trial by jury, spoken of in *Brady v. Southern Ry. Co.*, 320 U. S. 476, *Bailey v. Central Vermont Ry.*, 319 U. S. 350, and *Wilkerson v. McCarthy*, 336 U. S. 53, cited by petitioner (pp. 18, 19, 20) only applies to actions for money and not to equity actions for avoidance of a release. The Seventh Amendment does not affect equity suits. *American Life Ins. Co. v. Stewart*, 300 U. S. 203; *Connecticut General Life Ins. Co. v. Candimat Co.*, 83 F. S. 1. Petitioner's contentions ignore the well-known rule that where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and if an issue of law remains it is triable to a jury. See *Radio Corporation v. Raytheon Manufacturing Co.*, 296 U. S. 459; *Liberty Oil Co. v. Condon Bank*, 260 U. S. 235 (citing Ohio cases);

*American Mills Co. v. American Surety Co.*, 260 U. S. 360; *Meyer v. Meyer*, 153 O. S. 408; *Picklesimer v. B. & O. R. R. Co.*, 151 O. S. 1.

The trial court was charged with the responsibility of determining whether there was any clear, unequivocal, convincing and satisfactory evidence of fraud or misrepresentation upon the part of respondent, *Chicago, St. P., M. & O. Ry. Co. v. Belliwith*, 83 F. 437. Under both federal and state practice, the trial court had the right to determine this question upon the presentation of proper motions, both during trial and after the verdict. It is submitted that the trial court was correct in concluding that the petitioner had failed both in law and in equity to sustain his allegations of fraud by clear, unequivocal and convincing evidence. The court's action in sustaining respondent's motion for judgment notwithstanding the verdict was clearly justified and did not violate the Seventh Amendment. *Galloway v. United States*, 319 U. S. 372; *United States v. Louisiana*, 339 U. S. 699; *Brady v. Southern Ry. Co.*, 320 U. S. 476; *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U. S. 573.

The Ohio law is also quite clear that if a release is not void but only voidable, the releasor cannot maintain an action for the original wrong until the release is set aside. *Perry v. O'Neil & Co.*, 78 O. S. 200; *Jackson v. Ely*, 57 O. S. 450; *Cassilly v. Cassilly*, 57 O. S. 582; *Toledo & Ohio Central Ry. Co. v. Coleman*, 12 O. C. C. (n. s.) 497, affirmed without opinion, 81 O. S. 522.

Under both Ohio and Federal decisions, the action of the jury on the question of the validity of the release was not binding upon the court and the court had the right to consider all the evidence, and the special findings of the jury as advisory, and enter judgment accordingly. (*American*) *Lumbermens Mutual Casualty Co. v. Timms &*

*Howard Inc.*, 108 F. 2d 497; *Federal Reserve Bank v. Idaho*, *Grimm Alfalfa Seed G. Ass'n.*, 8 F. 2d, 922, certiorari denied 270 U. S. 646; *Perkins v. Prudential Ins. Co. of America*, 69 F. 2d, 218; *Idaho & Oregon Land Co. v. Bradbury*, 132 U. S. 509; *Kohn v. McNulta*, 147 U. S. 238; *Dunphy v. Kleinsmith*, 78 U. S. 610; *Perego v. Dodge*, 163 U. S. 160; *Perry v. O'Neil & Co.*, 78 O. S. 200; *Flynn v. Sharon Steel Corp.*, 142 O. S. 145.

When a court of equity calls a jury it is only for the purpose of enlightening its conscience and not to control its judgment. *Quinby v. Conlan*, 104 U. S. 420, 424; *Basey v. Gallagher*, 20 Wall. 670.

The jury's findings of fact (R. 19-20) did not indicate that respondent was guilty of fraud or misrepresentation as charged in the amended reply. The finding of the jury that the release of June 14, 1944, was null and void, "since the defendant did not adhere to the validity of the agreement and release \* \* \* therefore, reopening the situation by continuing to make payments to the plaintiff," and its finding that the release of September 5, 1944 (Pet. Ex. 6; R. 125, 165), was "invalid because of conflicting dates September 5th and September 9th, 1944," were of no force and effect in support of the general verdict of the jury. See *C., C. & St. L. Ry. Co. v. Green*, 126 O. S. 512; *Stone v. New York Central Rd. Co.*, 20 O. L. A. 322; *Standard Textile Products Co. v. Pertchi*, 23 O. L. A. 70; *Litchfield v. Standard Oil Co.*, 30 O. L. A. 235; *Gunter v. Standard Oil Co.*, 60 F. 2d 389 (see also citations in opinion); *Huntington v. Toledo, St. L. & W. R. Co.*, 175 F. 532 (see also citations in opinion).

Petitioner contends (at pages 19 and 20) that if "the validity of the release is a jury issue, particularly, when there is fraud in factum, then the evidence in this case is such that under federal law, as applied by federal courts,

motions for a directed verdict or a judgment for the defendant notwithstanding the verdict of the jury in favor of the plaintiff, would have been overruled and not sustained," and further "If there is any conflict in the evidence, it is for the jury and not the court to resolve." This contention ignores the well-established rule as to the quantum of proof required to establish fraud, referred to above.

The Ohio courts in upholding the release did not do so under any rule of local practice or procedure, but followed the substantive law of Ohio. Counsel for petitioner in their brief, pages 20, 21, cite *Brown v. Western Railway of Alabama*, 338 U. S. 294, but the Ohio decisions do not conflict with the opinion of Mr. Justice Black in this case, as pointed out by Judge Taft in his opinion, 155 O. S. at page 196.

The decision of the Supreme Court of Ohio is controlling and should be upheld under the provisions of Section 1652 of The Rules of Decision Act, Title 28 U. S. C., which reads as follows:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The purpose of this Section is stated by Chief Justice Vinson in *King v. Order of Travelers*, 333 U. S. 153. See *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541; *Woods v. Interstate Realty Co.*, 337 U. S. 535; *Guaranty Trust Co. v. York*, 326 U. S. 99; *West v. A. T. & T. Co.*, 311 U. S. 223; *The Adour*, 21 F. 2d 858, D. C. Maryland (a stevedore's release case).

The fact that the release was of a right given by Federal statute did not preclude the Supreme Court of Ohio from determining the validity of petitioner's release under

applicable State law. *Regents of Georgia v. Carroll*, 338  
U. S. 586.

### CONCLUSION.

It is respectfully submitted that both the facts and the law, whether viewed as Federal or State law, require the affirmance of the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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